

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SUFFOLK COUNTY

SUPREME JUDICIAL
COURT NO. DAR-_____

APPEALS COURT
NO. 2016-P-1107

COMMONWEALTH,
Respondent

v.

JOSEPH COUSIN,
Petitioner

APPLICATION FOR DIRECT APPELLATE REVIEW

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INTRODUCTION AND REQUEST
FOR DIRECT APPELLATE REVIEW

In 2004 Shawn Drumgold filed a Federal civil rights lawsuit against homicide detectives and the Boston Police Department/City of Boston. The lawsuit arose out of his vacated, wrongful conviction, previously affirmed on appeal, *Commonwealth v. Drumgold*, 423 Mass. 230 (1996), and 14 years of lost liberty. The lawsuit alleged a corrupt environment within the Boston Police Department ("BPD") Homicide Unit as reflected in an unconstitutional interrogation, falsely undermining an alibi, facilitating an identification through coercion, suggestion, intimidation and threats, withholding exculpatory evidence, failure to properly train and monitor officers, as well as the department condoning and encouraging wrongful conduct. After years of litigation, including two trials and a 14-million-dollar verdict that was appealed, the BPD/City of Boston paid millions of dollars to settle Mr. Drumgold's claims.

During attorney William White's representation of Joseph Cousin (resulting in a murder conviction after a second trial in 2009), Mr. White was engaged in a contractual relationship with the City of Boston to defend against Drumgold's allegations of police misconduct and corruption. Mr. White's involvement in the Drumgold case went from initially working on behalf of all named defendants, including the City of Boston, to filing an

appearance on behalf of one homicide detective, and then another, each at the direction of the City. Mr. White's contractual relationship with the City to defend against police misconduct claims would earn him in excess of \$300,000.00.

Subsequent to initiation of the Drumgold lawsuit, Stephan Cowans also filed a Federal civil rights lawsuit against police officers and the BPD/City of Boston. The lawsuit arose out of revelations that Mr. Cowans was actually innocent and had, among other misconduct, been framed by two police officers, Dennis Leblanc and Rosemary McLaughlin of the BPD latent print unit. An extensive post-conviction investigation by the authorities, including the eventual work of a grand jury, established that Leblanc and McLaughlin fabricated fingerprint evidence against Mr. Cowans and then sought to cover up the misconduct through trial. The conviction achieved was, again, affirmed by our appellate courts. *Commonwealth v. Cowans*, 52 Mass. App. Ct. 811 (2001). The Federal lawsuit alleged the intentional presentation of false evidence, failure to adequately investigate, concealing deceptive misconduct, and the BPD/City of Boston tacitly acquiescing in, condoning or encouraging unconstitutional conduct, including but not limited to fabricating evidence and suppressing exculpatory evidence.

Two days before William White entered an appearance in the Drumgold civil rights case, his partner at Davis,

Robinson & White, LLP, Francis Robinson, entered an appearance in Federal court to represent officer Rosemary McLaughlin in the Cowans case. The BPD/City of Boston paid millions of dollars to resolve Mr. Cowans' claims.

Boston police officers Dennis Leblanc and Rosemary McLaughlin are the two BPD print analysts who, working with Detective Daniel Keeler (known as "Mr. Homicide"), completed the fingerprint work in the case against Joseph Cousin. Leblanc and McLaughlin were ultimately fired from the police department by the time of Mr. Cousin's second trial; Detective Keeler was removed from the homicide unit due to misconduct; and the BPD fingerprint unit was shut down. New personnel in the reconstituted fingerprint unit re-examined the prints that Leblanc and McLaughlin obtained in Mr. Cousin's case. Seven years after Mr. Cousin's arrest and three weeks before his second trial in 2009, the Commonwealth disclosed to attorney White that exculpatory prints matching an individual named Daryl Richardson had been pulled from a vehicle by LeBlanc and McLaughlin in 2002, but never disclosed. "Daryl" was one of two individuals initially identified as the perpetrators by a just-turned fifteen-year-old boy during a more than one hour "off-tape" and undocumented interrogation by Detective Keeler, without the boy's parents present. Detective Keeler only documented the boy's changed story identifying Joseph Cousin and his eventually acquitted codefendant, Marquise Nelson, as the perpetrators, completely omitting the boy's

initial identification of "Daryl" and the other known individual. Detective Keeler also omitted the boy's failure to identify Mr. Cousin when shown a photo array.

These new fingerprint revelations, among other troubling police conduct in Mr. Cousin's case, raised the prospect of further misconduct by Leblanc and McLaughlin, as well as the demoted Detective Keeler who managed the fingerprint evidence with them. This evidence, if pursued by attorney White, required him to investigate and accuse McLaughlin -- the client of his own firm in the Cowans matter involving framing an innocent man with fingerprint evidence -- of similar misconduct. A defense of Mr. Cousin grounded in such accusations would require Mr. White to make very public assertions, in a highly-publicized case, of police misconduct while simultaneously serving as the lead attorney of record in the highly publicized Drumgold civil rights case pursuant to a lucrative contractual relationship with the BPD/City of Boston. As noted, similar accusations against LeBlanc and McLaughlin in the Cowans matter had already resulted in millions of dollars of liability to the City.

On February 10, 2016, after extensive briefing and three days of evidentiary hearings accompanied by 32 exhibits, the Superior Court (Sanders, J.) found an actual conflict of interest and granted Joseph Cousin's motion for a new trial. The judge rejected the assertion, espoused by the Commonwealth throughout this litigation, that an actual

conflict of interest can only be found where limited, rigid factual categories have been established. The defense asserts that the Commonwealth's formulation of what can comprise an actual conflict arises from an unduly restrictive interpretation of this Court's rather limited conflicts jurisprudence; runs afoul of well-established conflict of interest principles; and, as touched upon *infra*, is contrary to extensive case law in federal and state courts around the country.

Joseph Cousin now respectfully approaches the Supreme Judicial Court on grounds that this is a case the Court should determine. Notwithstanding well-established conflict of interest principles as set forth in, *inter alia*, our Rules of Professional Conduct and this Court's descriptions of law, the Supreme Judicial Court has not been afforded a wide variety of cases to apply conflict of interest principles as compared to many other state supreme courts. *See Commonwealth v. Croken*, 432 Mass. 266, 272 (2000) (noting limited variety of cases in Massachusetts). *Commonwealth v. Mosher*, 455 Mass. 811, 820 (2010) (summarizing typical cases in Massachusetts). Where the issues at bar implicate constitutional jurisprudence including the standard to be applied on review, the comparative burdens imposed by the Federal and State Constitutions, as well as fundamental questions about the contours of this Court's body of conflict of interest case law (see issues described at pp.

33-38), it should be the Supreme Judicial Court that resolves the issues, not an intermediate appellate court.

Moreover, as extensively documented in the litigation below and acknowledged by attorney White, the Cowans, Drumgold and Cousin cases were all the subject of immense public interest and media attention, with the Drumgold and Cousin cases peaking simultaneously in 2009 while Mr. White was counsel of record in both matters. Indeed, Mr. White as a lead attorney defending against police misconduct allegations in the Drumgold case was himself the subject of media attention due to the amount of money he was being paid by the City of Boston. Where the conflict issues at bar arise out of a deeply disturbing era in the Boston Police Department and involve legal cases that have been of great public concern, the issues should be resolved by our Supreme Judicial Court. See Mass. R. App. P. 11(a)(setting forth "public interest" as factor justifying review).

Pursuant to Mass. R. App. P. 11, Joseph Cousin respectfully requests direct appellate review.

STATEMENT OF PRIOR PROCEEDINGS

On September 4, 2002, Marquis Nelson and Joseph Cousin were indicted on charges of First Degree Murder, Unlawful Possession of a Firearm, Receiving a Stolen Motor Vehicle and Possession of a Sawed-Off Shotgun. The indictments arose out of the death of Trina Persad, a 10-year-old child who was struck by gunfire at Jermaine Goffigan Park in Roxbury.

Trial commenced against both defendants on November 16, 2004 (Hinkle, J., presiding).

On December 21, 2004, the jury returned verdicts acquitting Mr. Nelson of all charges, after which they continued deliberations. The jury would later make known, consistent with defense assertions, that they believed the police had "set up" Mr. Nelson and Mr. Cousin. See *Commonwealth v. Cousin*, 449 Mass. 809, 812 (2007). As the jury continued to deliberate, the prosecution commenced a mid-deliberation investigation of jurors, two of whom were subsequently accused of answering juror questionnaires inaccurately. A mistrial was declared on all charges against Mr. Cousin.

A second trial commenced on September 11, 2009 (Holtz, J., presiding). On October 5, 2009, the jury returned a verdict of guilty on the lesser-included charge of second degree murder. Mr. Cousin was sentenced to prison for life. A timely notice of appeal was filed and his appeal was entered on the docket of the Appeals Court on November 16, 2012 (2012-P-1810).

Mr. Cousin filed a motion for a new trial on March 1, 2013. The Commonwealth filed an opposition on October 21, 2013, and a reply to the opposition was filed on November 4, 2013. On May 21, 2015, the Superior Court (Sanders, J.) issued a decision (Attachments at 40-44) ordering an evidentiary hearing focused on a first-stage inquiry whether there was an actual conflict of interest. This

ruling was followed by three days of evidentiary hearings and the introduction of 32 exhibits. In all, Judge Sanders held six hearings on Mr. Cousin's motion for a new trial and received extensive written submissions from the parties, including post-evidence memoranda. On February 11, 2016, Judge Sanders ordered a new trial, finding actual conflicts of interest (Attachments at 45-68).

The Commonwealth's appeal from the grant of a new trial was entered in the Appeals Court on August 9, 2016 (2016-P-1107). Mr. Cousin's direct appeal was stayed pending outcome of the Commonwealth's appeal. The Commonwealth filed a brief in the Appeals Court on November 4, 2016. This petition followed.

STATEMENT OF FACTS¹

¹ The facts presented here are limited almost entirely to evidence presented at the evidentiary hearings ("Ev.Hrg.") and what the Court needs to understand when considering the conflict issues. The live issues in Mr. Cousin's case as reflected in his trial proceedings "(Tr._/_)" have some utility in understanding the conflicts of interest, and are therefore touched on as well. Mr. Cousin will refrain, however, from reciting extensive detail to depict the far-from-overwhelming state of evidence in his case. It should be noted that this stands in stark contrast to the brief filed in the Appeals Court by the Commonwealth ("C.Br."). That brief reviews evidence from the second trial not to assist in understanding the live issues that any attorney representing Mr. Cousin would be confronted with, but rather to paint an extraordinarily partial, inaccurate picture of supposed overwhelming guilt. The Commonwealth's misleading presentation devotes 12 pages to a one-sided view of the evidence, devotes a mere eight lines to a defense case involving an alibi and 10 witnesses, and then cherry-picks evidence from R.30 hearings despite the judge's contrary findings of fact based on credibility determinations.

The Arrest & Trials of Joseph Cousin.

After the acquittal of Marquise Nelson and the mistrial as to Mr. Cousin in December, 2004, Willie Davis continued to represent Mr. Cousin until October, 2008 (Cousin Docket). Mr. Davis withdrew and, at his suggestion (Tr.10/14/08:14), William White, who had been a partner in the firm Davis, Robinson & White, LLP with Mr. Davis for approximately 15 years until May, 2007 (Ev.Hrg.I/19), was appointed to represent Mr. Cousin (Ev.Hrg.I/52; see Tr.10/14/08 and 10/20/08; Cousin Docket). Mr. White filed an appearance on October 22, 2008 (Cousin Docket). The second trial commenced on September 11, 2009.

The evidence at issue in the prosecution of Mr. Cousin was by no means typical in that there were substantial issues of potential police misconduct during the investigation and development of evidence against him (Ev.Hrg.I/108-113, 119-128). This was not only reflected in the evidence and the defense of Mr. Cousin and Mr. Nelson at the 2004 trial (Tr.12/8/04; MNT.Exh.37), it was reflected in sentiments expressed by jurors from the first trial who made known their belief that the police had "set up" Mr. Nelson and Mr. Cousin. See *Commonwealth v. Cousin*, 449 Mass. 809, 812 (2007).

Evidence against Mr. Cousin was far from overwhelming. Mr. Cousin presented alibi evidence from a number of sources, including cab records (Tr.11/52-56), a cab driver (Tr.11/66-68), an employee of the Inner City Horizons DYS

program (Tr.11/207-211, 216-217), bus schedules and transportation evidence (Tr.11/200-202), his fiancé, his fiancé's grandmother, his mother, a friend, a participant playing in a basketball league at Washington Park, and that participant's mother. These witnesses placed Mr. Cousin at his fiancé's home (Tr.11/8-10, 38-39), in a cab (Tr.11/66-68), with his mother at a juvenile detention facility to visit his brother (Tr.11/74, 78-83, 207-211, 216-217), and later on a bus with a friend to Washington Park to watch a basketball game, after which he returned on the bus with the friend (Tr.11/136-148, 219-223; Tr.12/9/04:96).

The Commonwealth's opposing evidence relied substantially on the testimony of Cordell McAfee, who had just turned 15 years old on the night in question (Tr.9/6, 9, 23). At the 2004 trial the Commonwealth relied upon Mr. McAfee's testimony that placed Mr. Cousin in the area of Columbia Road as early as 12:00 p.m., a version of events that was flatly inconsistent with the alibi evidence. During the 2004 trial the Commonwealth asserted that Mr. Cousin's alibi was fabricated, including his alleged presence at Washington Park during the early evening of June 29, 2002. In the 2009 trial, the Commonwealth relied on an adjusted version of events and timing by Mr. McAfee, this time conceding that Mr. Cousin was at Washington Park to watch basketball (Tr.9/39, 169, 172-179, 180-186, 189).

Any attorney representing Mr. Cousin at the 2004 trial and, particularly, the 2009 trial, would have been

confronted with significant issues of potential police misconduct. Clear avenues of defense were grounded in attacks on the police investigation and the conduct of the homicide unit and Boston Police Department (Ev.Hrg.I/108-113, 119-128). Issues of police misconduct and a biased investigation included a deceptive interrogation of Mr. Cousin (Ev.Hrg.I/108); the off-tape interrogation by Detective Daniel Keeler of 15-year-old Cordell McAfee -- the Commonwealth's primary witness -- for more than an hour (Tr.9/130, 142, 144, 157; 10/75; Tr.12/8/04:41-44, 47, 61), resulting in a changed confession from identifying "Daryl and Man" as the two other participants with him during the shooting, to Marquise Nelson and Joseph Cousin (Ev.Hrg.I/108; MNT.Exh.37; Tr.11/238-23; 9/104, 129-130, 154-155, 226; Tr.12/8/04:51-62); Detective Keeler's subsequent creation of a taped statement from Mr. McAfee that omitted his changed confession and his failure to identify Mr. Cousin in a photo array (*id.*); the failure to disclose fingerprints lifted in 2002 until seven years after Mr. Cousin's arrest that provided potential corroboration of Mr. McAfee's initial confession identifying Daryl and Man (Ev.Hrg.I/112-113; Tr.8/60-70, 77-79); the coercion of witnesses to acquire an identification, one of whom signed an affidavit to that effect retracting his identification of the defendants, and later retracting his retraction (Ev.Hrg.I/121-122; Tr.8/116, 122-124, 197-198, 200, 233-236); the presentation of false and coerced testimony at

trial to identify Mr. Cousin (Ev.Hrg.I/123; Tr.5/146-151, 155-156); the failure of police to investigate or pursue the two individuals named by Mr. McAfee in his initial confession to police (Ev.Hrg.I/123-125); and the failure to seek corroboration of critical facts and witnesses central to the case against Mr. Cousin, such as the claimed existence of an individual named "Steve" who played a central role in Mr. McAfee's version of events to police (Ev.Hrg.I/122-123; G.J.Tr.7/11/02:17-19; Tr.12/8/04:65; see generally Ev.Hrg.I/108-113, 119-128.)

The Law Firm of Davis, Robinson & White, LLP.

The law firm of Davis, Robinson & White, LLP consisted of three partners: Willie J. Davis, Frances L. Robinson, and William M. White, Jr. (Ev.Hrg.I/19). The partners began practicing together in 1992 or 1993 (Ev.Hrg.I/19). In 1996, steps were taken to form a limited liability partnership (Ev.Hrg.I/19; Ev.Hrg.Exh.32). The firm was registered as a limited liability partnership with the Secretary of State in 1996, had its own Federal Employment Identification Number (FEIN), and became an entity of public record. (Ev.Hrg.I/22-23; Ev.Hrg.Exh.32.) The purpose in forming the limited liability partnership was, in part, to shield the individual partners from liability and to create a legal entity that would be held out to the public (Ev.Hrg.I/22-23). The firm did not have or use a disclaimer of joint responsibility (Ev.Hrg.I/25-26, 34, 38-39). See Mass. R. Prof. Conduct 7.5(d).

The Davis, Robinson & White, LLP partners used letterhead bearing the name of the firm with the partners listed on the left side of the page (Ev.Hrg.I/27-28, 36). They used business cards showing the name of the firm (Ev.Hrg.I/27). When appearing in court, the partners signed their name as a member of the firm by indicating the name of the firm (Ev.Hrg.I/27, 36). When Mr. White wrote correspondence to opposing counsel, court clerks, and clients, he used Davis, Robinson & White, LLP letterhead (Ev.Hrg.I/36). In addition to operating in the same space, the partners shared and contributed toward rent, common office equipment such as a fax machine, the cost for a firm receptionist or secretary, and the presence of an associate attorney (Ev.Hrg.I/31, II/96-99). In terms of income, each partner's labor and billing determined what each received (Ev.Hrg.I/99, 150). Certain insurance defense work was handled on a shared or collaborative basis (Ev.Hrg.I/34). Criminal cases were handled by the partners individually (Ev.Hrg.I/34). Cases handled by the firm and issues that arose, even if sensitive, were the subject of regular discussion among the partners.²

² See Ev.Hrg. I/116, during his representation Mr. Davis spoke to Mr. White about the Cousin case; I/114, partners would go out "on a Tuesday or a Wednesday night and talk about our cases"; I/151, Partners would talk about issues in cases that were "sensitive"; II/106, when Mr. Davis was handling Mr. Cousin's case he communicated with Mr. White about specific issues; II/109, the partners would "talk about the kind of things we were involved in."

Davis, Robinson & White, LLP & Relationship with the Union for the Boston Police Department.

Mr. White agreed that Davis, Robinson & White, LLP had a relationship with the union for the Boston Police Department, and that "[t]here was a referral relationship wherein the partners of the firm would handle administrative matters for police officers within the Boston Police Department." (Ev.Hrg.I/39-40.) Mr. Davis also had a relationship with an African American organization within the Boston Police Department (Ev.Hrg.I/39-40). Mr. White's understanding was that legal counsel for the police union would refer cases involving its members to partner Francis Robinson (Ev.Hrg.II/16). All partners in the firm at times handled cases that came from the union (Ev.Hrg.I/39, II/78). Though his memory was not clear, Mr. White could recall occasions on which he himself represented police officers relative to administrative matters that resulted from this relationship with the union (Ev.Hrg.II/30).

The Stephen Cowans Civil Rights Litigation & Francis Robinson's Defense of Rosemary McLaughlin's Alleged Misconduct.

Dennis LeBlanc and Rosemary McLaughlin were two fingerprint analysts in the fingerprint unit of the Boston Police Department (Ev.Hrg.I/40-41; Ev.Exh.1 (Cowans Docket); MNT.Exh.4 (Cowans Complaint)). Mr. LeBlanc and Ms. McLaughlin were known to work together and conducted the fingerprint work in Mr. Cousin's case (*id.*; MNT.Exh.13 at 151; Ev.Hrg.III/135). Detective Daniel Keeler, who was the

lead homicide detective in Mr. Cousin's case, was also involved in working with LeBlanc and McLaughlin (Tr.10/85, noting that all communication with Leblanc and McLaughlin "would have come through Sergeant Keeler who would have been discussing" fingerprint evidence).

On July 27, 2005, both officers LeBlanc and McLaughlin were named in a Federal lawsuit filed by Stephen Cowans alleging that they had framed him with false fingerprint evidence (Ev.Hrg.I/41; Ev.Hrg.Exh.1 (Cowans Docket); MNT.Exh.4 (Cowans Complaint)). The lawsuit alleged that LeBlanc and McLaughlin intentionally engaged in presenting false evidence, failed to adequately investigate the crime and, along with others in the fingerprint and homicide units, concealed their deceptive misconduct throughout Stephen Cowan's trial (Ev.Hrg.I/128; MNT.Exhs.4, 35; Cousin Mem. of Law at 34-36). The Boston Police Department was included as a defendant in the Federal lawsuit for allegedly violating its duty to adequately supervise its officers relative to conducting proper investigations and disclosing exculpatory and impeachment evidence, thereby tacitly acquiescing in, condoning or encouraging unconstitutional conduct, including fabricating evidence, suppressing exculpatory evidence, and failing to investigate (MNT.Exh.4).

Francis Robinson, as a partner of Davis, Robinson & White, LLP, filed an appearance as the lead attorney to defend McLaughlin against the police misconduct allegations

(Ev.Hrg.I/43, 48; Ev.Hrg.Exh.5). The appearance was filed on April 5, 2006, and utilized the general Davis, Robinson & White, LLP law firm email account - "DRWLLP@aol.com" - as the contact account for service of documents, court orders, and court notices in the United States District Court's ECF docketing system (Ev.Hrg.I/43, 48, 72; Ev.Hrg.Exh.5).³

Attorney Robinson represented Ms. McLaughlin throughout the Cowans case, which resolved on September 20, 2007 (Ev.Hrg.Exh.1). The City of Boston paid millions of dollars to Mr. Cowans (Ev.Hrg.I/56).

The Shawn Drumgold Civil Rights Litigation & William White's Defense of Alleged Police Misconduct.

Another substantial Federal civil rights lawsuit was filed in 2004 by Shawn Drumgold against the Commissioner of the Boston Police Department, individually named homicide detectives, and the City of Boston (Ev.Hrg.Exh.2). The lawsuit arose out of the Boston Police Department Homicide Unit's investigation into the death of Tiffany Moore, a 12 year old girl, which resulted in the arrest and subsequent conviction of Shawn Drumgold (Ev.Hrg.I/74; Ev.Hrg.Exh.2).

The Federal lawsuit filed by Mr. Drumgold raised allegations that homicide unit detectives violated Mr. Drumgold's constitutional rights when interrogating him (Ev.Hrg.I/96-97); that detectives falsely undermined Mr.

³ The ECF system is an electronic case filing system in Federal court that is the means by which all filings, service of documents, and communication from the court are accomplished (Ev.Hrg.I/72).

Drumgold's alibi (Ev.Hrg.I/101); that detectives facilitated identification of Mr. Drumgold through suggestion, coercion, intimidation and threats, causing witnesses to appear and testify falsely (Ev.Hrg.I/97-100); and that exculpatory evidence was withheld ((Ev.Hrg.I/101). (See generally Ev.Hrg.I/88-89, 96-101; Ev.Hrg.Exh.12.)

The claims against named homicide detectives likewise served as a basis for the claims against the Boston Police Department/City of Boston⁴ and allegations that the Boston Police Department/City of Boston failed to properly train and monitor police officers, condoned and encouraged wrongful police conduct by permitting the actions of individual police defendants in the case (Ev.Hrg.I/102-103; Ev.Hrg.Exh.12). Drumgold raised claims that there was a "custom and practice of using threats, intimidation, perjured evidence and withholding of exculpatory evidence to convict black males" by means of "false and coerced testimony" (Ev.Hrg.I/102-103; Ev.Hrg.Exh.12).

William White, as a partner of Davis, Robinson & White, LLP, was hired by the City of Boston to assist in defending against allegations of police misconduct in the Drumgold litigation (Ev.Hrg.I/107-108, 129). Mr. White entered into a contractual relationship with the City of Boston that provided for an hourly rate of pay (Ev.Hrg.I/161). Contracts were renewed each fiscal year (Ev.Hrg./102-103).

⁴ The "Boston Police Department/City of Boston" is indicated here because they are, in fact, one and the same.

Mr. White submitted bills on a monthly basis for payment and, upon review and approval by the City, payment was received (Ev.Hrg.I/102-103).

At the outset, Mr. White was brought into the Drumgold case to assist all of the defendants, which involved working with the other attorneys for individually named defendants and the City of Boston (Ev.Hrg.II/79-81). Mr. White's work at this stage included a review of "the entire history of the case" and evaluating the positions of each of the defendants (Ev.Hrg.II/79-81). Mr. White entered an appearance in Federal court on behalf of homicide detective Paul Murphy on April 8, 2006 and, subsequently, on behalf of homicide detective Timothy Callahan on January 29, 2008, both of whom were indemnified by the City (Ev.Hrg.I/45-46, 50; II/82; Ev.Hrg.Exhs.2, 4).

Mr. White's initial appearance as an attorney of record in the Drumgold litigation was filed two days after his partner, Francis Robinson, filed an appearance to defend against allegations of police misconduct within the Boston Police Department as lead counsel for Rosemary McLaughlin (Ev.Hrg.II/80; Ev.Hrg.Exhs.3, 5). Mr. White appeared as lead counsel on behalf of Detective Murphy as a partner of Davis, Robinson & White, LLP, signing his name and the name of the firm to his notice of appearance (Ev.Hrg.I/46; Ev.Hrg.Exh.3).

The Drumgold litigation listed detective Daniel Keeler, the lead homicide detective in the Cousin case, as

a factual witness (Ev.Hrg.I/76-77, 84, 85; Ev.Hrg.Exh.11 at p.10 #16). Rosemary McLaughlin was likewise listed as a potential witness; her work in Drumgold was implicated (Ev.Hrg.I/76, 84, 87-88; Ev.Hrg.Exhs.8 at p.3 #37, 9 at p.1 #9, 10 at p.2 #11), and her alleged misconduct in the Cowans case was raised as evidence against the City of Boston/Boston Police Department (Ev.Hrg.II/84; Ev.Hrg.Exh.24). Others who were involved in the Cousin investigation and trial were likewise involved in the Drumgold investigation and litigation, including Detective Robert Merner, Detective Greg Brown, Officer Larry Celester, and Sergeant Michael Stratton (Ev.Hrg.II/92-93; compare Ev.Hrg.Exh.14 to various Drumgold witness lists).

Claims against Detective Murphy were dismissed on January 7, 2008 for failure to properly substitute his estate after his death (Ev.Hrg.I/50; Ev.Hrg.Exh.2). That same month, Mr. White continued his work by filing an appearance as a lead attorney for homicide detective Timothy Callihan (Ev.Hrg.I/50). At the time of filing an appearance on behalf of Detective Callihan, Mr. White had started his own firm, William M. White & Associates, LLC and moved one door down from his former partners, Francis Robinson and Willie Davis (Ev.Hrg.I/32-33). Mr. White's LLC was established on August 3, 2007, and he remained at this location for a period of one and one half years until January 9, 2009, and then moved to an address at Lewis Wharf (Ev.Hrg.I/155; MNT.Exh.8). While located one door down from

his former partners, Mr. White continued work for a common insurance client and continued sharing common insurance files (Ev.Hrg.I/155; Ev.Hrg.II/34).

Mr. Cousin's Case: From Willie Davis to William White.

In October of 2008, Mr. Davis sought to withdraw from representing Mr. Cousin (See Tr.10/14/08; Ev.Hrg.III/22). A proceeding occurred before Judge Hinkle on October 14, 2008 during which Mr. Davis suggested that William White be appointed to take the case, noted that he had spoken to him already, and noted that he was located just one door down in the hallway (Tr.10/14/08:14). Mr. Davis was permitted to withdraw on October 14, 2008, and Mr. White appeared as Mr. Cousin's counsel on October 20th, filing an appearance on October 22, 2008 (Ev.Hrg.I/52; see Cousin Docket). At the time Mr. White appeared as Mr. Cousin's counsel, he remained involved as a lead counsel defending against allegations of police misconduct in the Boston Police Department's homicide unit (Ev.Hrg.I/52).

Mr. White's Awareness of Extensive Media Coverage of the Drumgold, Cousin & Cowans Cases.

Both the Drumgold litigation and the prosecution of Mr. Cousin were followed closely and heavily covered by the media (Ev.Hrg.I/48, 54-55, 103, 140-141). Mr. White was aware of the "very high profile" nature of both cases, including publicity about his representation in Drumgold and amounts of money he had earned from the City of Boston to defend against Drumgold's allegations of police

misconduct (Ev.Hrg.I/48, 54-55). Mr. White was likewise aware that in the Drumgold case the City of Boston/Boston Police Department was "vigorously" defending itself and its officers in a very public manner. (Ev.Hrg.I/55).⁵

The Cowans case concerning allegations that Rosemary McLaughlin and Dennis LeBlanc engaged in misconduct in the fingerprint unit of the Boston Police Department was likewise a "high profile case" (Ev.Hrg.I/48, 56, 114, 117, 118-119). Mr. White was aware that Francis Robinson, his partner at Davis, Robins & White, LLP, represented McLaughlin, and he was aware of the problems in the fingerprint department at the time Mr. Cousin's case was investigated (Ev.Hrg.I/40, 43 (notices and court orders were sent to general firm email), 83, 116-119, 127-128, 136, 138). Mr. White testified that "I remember it [the Cowans case] being in the news, I remember it being in the

⁵ Mr. Cousin has identified extensive media coverage regarding the Drumgold, Cousin and Cowans cases in his memorandum of law and supporting exhibits below. A court may take judicial notice of extensive publicity, see *Ross v. Garabedian*, 433 Mass. 360, 368 (2001)(Sosman, J., dissenting)("this court can take judicial notice of the widespread publicity on these very [sexual abuse] issues"), *Kosilek v. Spencer*, 889 F. Supp. 2d 190, 215 n.6 (2012) (court can take judicial notice of articles and content, even when not in the record - citing multiple cases in support), see also, e.g., *Benak v. Alliance Capital Mgmt. L.P.*, 435 F.3d 396, 401 (3d Cir. 2006)(court may take "judicial notice of newspaper articles"; "[t]hey serve only to indicate what was in the public realm at the time"). The Commonwealth has not disputed the existence or content of extensive publicity. A sampling of media coverage is attached (Attachments at 2-15).

newspaper articles." (Ev.Hrg.I/117.) Mr. White was "aware of the issues with Rosemary McLaughlin because it was in the news and it was in newspaper articles." (Ev.Hrg.I/117.) Mr. White was likewise aware that the City of Boston paid millions of dollars to settle allegations in that case (Ev.Hrg.I/56).

Mr. White's Ongoing Contract with the City of Boston: A Significant Economic Interest.

As of September 2009 when Mr. Cousin's second trial was set to begin, the ongoing and active contractual arrangement between Mr. White and the City of Boston for his work in the Drumgold case had resulted in hundreds of thousands of dollars in income (Ev.Hrg.I/59-62; Ev.Hrg.Exh.6). A certified document provided by the City of Boston confirmed that the city paid Mr. White a total of \$310,941.79 for his work in Drumgold (Ev.Hrg.I/59-62; Ev.Hrg.Exh.6). Mr. White testified that he perceived the amount of money he was earning to be a "significant sum" (Ev.Hrg.I/59) and that it was significantly more than he would be paid working on an appointed criminal case, such as Mr. Cousin's case (Ev.Hrg.I/59-60). Mr. White testified that the income he earned from the Drumgold case "probably was close to 50% of his income" (Ev.Hrg.II/35-37).

Concurrent Representation Through Mr. Cousin's Second Trial & Anticipation of Future Work in the Drumgold Litigation.

Throughout Mr. White's representation of Mr. Cousin, he was a lead counsel for a homicide detective pursuant to a contractual arrangement with the City of Boston that

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provided, and had the potential to continue to provide, a significant economic interest (Ev.Hrg.I/45-46, 50, 59-62, 73; Ev.Hrg.Exhs.2, 4, 6). Mr. White attended a hearing in Federal court with other counsel as a lead attorney in the Drumgold case on August 19, 2009, just 23 days before Mr. Cousin's second trial was to begin on September 11th (Ev.Hrg.I/69; Ev.Hrg.Exh.2 at p. 65).

As of August, 2009, there was uncertainty whether Mr. Drumgold's second trial would go forward on a scheduled date of September 8, 2009, or would be pushed back to October (Ev.Hrg.I/69-70; Ev.Hrg.Exh.2 at p. 65). Mr. Drumgold's trial did proceed on September 8, 2009, creating a scheduling conflict with Mr. Cousin's trial (Ev.Hrg.I/70; Ev.Hrg.Exh.2 at p. 67). As a result of this scheduling conflict, Mr. White did not participate in Mr. Drumgold's second trial (Ev.Hrg.I/70). Because of Mr. White's last minute absence, Hugh Curran, who was involved in representing other parties in the Drumgold litigation, stepped in four days before the commencement of trial to assist with Detective Callihan's defense (Ev.Hrg.Exh.19).

Mr. White's practice, if discharged from a case with no prospect of further involvement, was to file a motion to withdraw his representation (Ev.Hrg.I/73). He testified that he "certainly" would do that in any case where his interests were terminated (Ev.Hrg.I/73). Notwithstanding the temporary scheduling conflict between the Drumgold and Cousin cases, Mr. White filed no notice of withdrawal from

the case, remained counsel of record as a lead attorney, and continued to receive service of documents, court notices, and court orders through the Federal ECF docketing system (Ev.Hrg.I/72-73). Mr. White was uncertain whether Mr. Drumgold's case would resolve through the second trial and anticipated the opportunity for future involvement (Ev.Hrg.I/72). Mr. White explained that "the City had not asked me to withdraw" and he wanted to remain available for future work (Ev.Hrg.II/28-29).

During his simultaneous representation in the Drumgold and Cousin cases, both cases were active and moving toward a peak (Ev.Hrg.I/129; see Cousin Docket). As of April, 2009, the Drumgold litigation became focused on the second trial as reflected in a joint motion Mr. White filed with the City of Boston to depose Mr. Drumgold further (Ev.Hrg.I/62-67; Ev.Hrg.Exh.2 at p. 73, Ev.Hrg.Exh.7). Discovery had occurred before the first trial and so a substantial amount of work was completed, but "a lot of work" was still required (Ev.Hrg.II/40-41). Trying the case required "a number of strategy sessions with regards to organizing the defense for trial" (Ev.Hrg.II/35). At this same time, Mr. White was heavily involved in review and preparation of Mr. Cousin's case and determining strategy (Ev.Hrg.I/73).

Same County, Same Police Department, Same Homicide Unit, & Similar Underlying Criminal Cases in Which Similar Alleged Police Misconduct Occurred.

A defense attorney's role in the Drumgold case involved defending against accusations of police misconduct

(Ev.Hrg.I/88-89, 96-101, 102-103). A defense attorney's role in the Cousin case required the ability to fully consider and potentially vigorously pursue accusations of police misconduct (Ev.Hrg.I/108-113, 119-128; Cousin Mem. of Law at 2-24). Apart from these contradictory positions, there are striking and rather extraordinary similarities between the two cases.

Both the Drumgold and Cousin cases arose in Suffolk County, involved the same police department, and concerned police conduct within the same homicide unit (Ev.Hrg.I/75). Both the Drumgold and Cousin cases concerned the tragic death of a young, female child, killed in alleged gang crossfire (Ev.Hrg.I/55, 74). Both the Drumgold and Cousin cases involved issues of police misconduct that were strikingly similar in nature, involving allegations of withholding exculpatory evidence, creating false police reports, creating false or suggestive identification evidence, coercion of witnesses, causing false testimony, and falsely undermining an alibi (Ev.Hrg.I/97-113, 121-127). Both the Drumgold and Cousin cases were being watched and portrayed heavily in the news media, where what was taking place had the potential to be widely broadcast (Ev.Hrg.I/48, 54-56, 103, 117-119, 140-141). Both the Drumgold and Cousin cases were unfolding simultaneously with very public trials that occurred in 2009 at the same time (Ev.Hrg.I/73, 129; see Cousin Docket; Ev.Hrg.Exh. 2).

Disclosure - After a Delay of Seven Years and Three Weeks Before Mr. Cousin's Second Trial -- that Leblanc and McLaughlin Had Lifted, But Not Disclosed, Additional Prints from the Honda Vehicle that Potentially Corroborated Mr. McAfee's Initial Confession.

Approximately three weeks before commencement of Mr. Cousin's September 2009 trial, Mr. White received new fingerprint information from the newly constituted fingerprint unit of the Boston Police Department (Ev.Hrg.I/112-113, 123-125, 127). That information revealed that in 2002 LeBlanc and McLaughlin had pulled fingerprints off of the Honda vehicle that had not been disclosed with their reported finding or during the following seven years (Ev.Hrg.II/112-113). One of those prints belonged to Daryl Richardson and provided potential corroboration of Cordell McAfee's initial, off-tape confession to Detective Daniel Keeler that Daryl and Man were the two individuals with him when the victim was shot and killed (Ev.Hrg.I/113).⁶

Mr. White was aware that this new fingerprint information was exculpatory (Ev.Hrg.I/113). Mr. White was aware that Francis Robinson, a partner of his firm Davis, Robinson & White, LLP, represented McLaughlin in the Cowans litigation concerning fingerprint misconduct (Ev.Hrg.I/40,

⁶ The new fingerprint evidence also included prints from an individual named Antonio Llamas (Tr. VIII/60-70), who Mr. Cousin's counsel asserts is a known gang member. Mr. Llamas is currently incarcerated for a murder (see Docket 0784CR10706). "Man" or Donald Williams is serving a sentence of several decades for attempted murder in one among many of his cases in the Suffolk County court system (see, e.g., Docket 0884CR11227).

43, 83, 117-119, 128, 136, 138). Mr. White attempted on his own to contact McLaughlin when he received this new fingerprint information (Ev.Hrg.I/134-135) and, when he was unable to do so, he sought out the assistance of his former partner, Francis Robinson, who arranged for him to speak with McLaughlin in the office of Ms. Robinson and Mr. Davis, who continued practicing together (Ev.Hrg.I/136-137). Mr. White testified that the assistance of his former partner, Francis Robinson, was necessary because even as late as 2009, McLaughlin was still contending with legal issues and was reluctant to speak with lawyers (Ev.Hrg.II/50).

Mr. White was aware that to investigate and pursue a potential avenue of attack grounded in the failure to disclose fingerprint evidence required him to investigate and attack a former client of his firm, Davis, Robinson & White, LLP, which handled McLaughlin's defense against allegations of misconduct in the form of framing Stephen Cowans with false fingerprint evidence (Ev.Hrg.I/127).

Mr. White was aware that allegations of misconduct against the client of his former firm, Davis, Robinson & White, LLP, were allegations that exposed the City of Boston, with whom Mr. White was currently engaged in a contractual arrangement, to liability, just as had occurred in the Cowans case for the same type of alleged misconduct involving fingerprint evidence (Ev.Hrg.I/127-129).

No Disclosure of Conflicts of Interest.

The testimony of both Mr. White and Mr. Cousin demonstrates that Mr. White did not disclose any conflict of interest to Mr. Cousin, nor seek or receive a waiver of any conflict of interest (Ev.Hrg.I/138-142, 144-147; II/105; III/21-84). Even if it is assumed that Mr. White referenced in some manner his involvement in the Drumgold litigation or any other circumstances when meeting with Mr. Cousin, testimony does not support that when doing so he disclosed a conflict of interest, or sought or received a clear and unambiguous waiver (Ev.Hrg.I/142).

Mr. White could provide no credible specifics of any conversation with Mr. Cousin and repeatedly relied on his belief that a conversation occurred because of what he says he typically would have done in such circumstances (Ev.Hrg.I/138-140). Mr. White did not document any disclosure or conversation with Mr. Cousin, nor did he inform any other person that such a disclosure or conversation occurred, including any court, judge, or lawyer (Ev.Hrg.I/146). Mr. White had no memory of a response by Mr. Cousin's to any such disclosure or conversation (Ev.Hrg.I/142).⁷

Mr. White's Awareness and Experience of Inherently Conflicting Interests.

Mr. White was aware of the tension and conflicting loyalties inherent in his concurrent representation in the

⁷ Mr. Cousin also testified and, as found by the judge below, corroborated the testimony of Mr. White (Attachments at 61).

Cousin and Drumgold litigations, and his contractual arrangement with the City of Boston, testifying that "[i]t was obvious [to him] that it was a conflict of interest..." (Ev.Hrg.II/105, 111).

GOVERNING CONFLICT OF INTEREST PRINCIPLES

The right to conflict free counsel is guaranteed by both the Sixth Amendment to the United States Constitution and art. 12 of the Massachusetts Constitution, *Commonwealth v. Martinez*, 425 Mass. 382, 378 (1997). "Because the assistance of legal 'counsel is vital to the adversary process,' *Commonwealth v. Connor*, 381 Mass. 500, 503 (1980), [the Supreme Judicial Court has] repeatedly insisted that this means '[a] defendant is entitled to the untrammelled and unimpaired assistance of counsel free of any conflict of interest and unrestrained by commitments to others.' *Commonwealth v. Michel*, 381 Mass. 447, 453 (1980), quoting *Commonwealth v. Davis*, 376 Mass. 777, 780-781 (1978)." *Martinez*, 425 Mass. at 387-388 (citations to regional reporter omitted). See also, *Commonwealth v. Perkins*, 450 Mass. 834, 850 (2008) (a defendant "must be able to rely on the undivided loyalty of his counsel to present the defense case with full force and zealouslyness") (emphasis added).

A conflict exists 'whenever there is tension between the interests of one client of an attorney and those of another.' *Commonwealth v. Michel*, 381 Mass. at 451; *Commonwealth v. Pires*, 389 Mass. 657, 661 (1983)." *Martinez*, 425 Mass. at 389. This includes circumstances "whenever an

attorney's regard for one duty, such as that owed to a third party or in service to his own interests, leads the attorney to disregard another duty, such as that owed to his client." *Perkins*, 450 Mass. at 851, citing *Commonwealth v. Goldman*, 395 Mass. 495, 503 (1985) (same). See also *Pires*, 389 Mass. at 661 (actual conflict exists when "attorney cannot use his best efforts to exonerate one defendant for fear of implicating another"). A.B.A. Canons of Professional Ethics, Canon 6 (1965) (same). *Commonwealth v. Geraway*, 364 Mass. 168, 174-175 (1973)(a conflict "arises whenever a lawyer is asked to represent two or more clients who may have *differing* interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant")(emphasis in original), quoting Canons of Judicial Ethics, Ethical Consideration (EC) 5-14. *The McCourt Co., v. FPC Properties, Inc.*, 386 Mass. 145 (1982) (a law firm cannot defend Client A in one action, and then represent Client B who is acting adversely to Client A in a different action; "It is also irrelevant that the lawsuits are unrelated in subject matter"; "[t]he undivided loyalty that a lawyer owes to his clients forbids him, without the clients' consent, from acting for client A in one action and at the same time against client A in another").

Where there are "conflicting interests the evil -- it bears repeating -- is in what the advocate finds himself compelled to refrain from doing" (emphasis in the original). *Holloway v. Arkansas*, 435 U.S. 475, 490 (1978). See also,

e.g., Goldman, 395 Mass. at 505 (noting risk that counsel will be "inhibited, even if only subconsciously, in his representation of the defendant").

Under art. 12 of the Massachusetts Constitution, once a genuine or "actual" conflict has been shown, Mr. Cousin is not required to demonstrate that the conflict caused prejudice to him, *Martinez*, 425 Mass. at 388. Upon demonstrating a conflict, reversal is automatic. *Id.*; *e.g., Commonwealth v. Cobb*, 379 Mass. 456, 459 (1980). The Massachusetts Constitution requires this more protective course to

avoid putting a defendant in the untenable position where he would otherwise 'be put to the burden, perhaps insuperable, of probing the resolve and the possible mental conflict of counsel. Both the potential for [adverse effect on counsel's performance] and the difficulty of proving it are apparent, particularly as to things that may have been left not said or not done by counsel.'

(Emphasis added.) *Martinez*, 425 Mass. at 388, quoting *Hodge*, 386 Mass. at 169-170, quoting *Cobb*, 379 Mass. at 461 vacated sub nom. *Massachusetts v. Hurley*, 449 U.S. 809 (1980), appeal dismissed, 382 Mass. 690 (1981).

Under the Sixth Amendment, Mr. Cousin is required to demonstrate conflicting interests as well as the general presence of some adverse impact. See *Cuyler v. Sullivan*, 446 U.S. 335 (1980). Under the federal standard, when a conflict is apparent a sufficient showing of adverse impact is satisfied without requiring unrealistic standards of specificity:

When there is a conflict of interest such as exists in this case, the prejudice may be subtle, even unconscious. It may elude detection on review. A reviewing court deals with a cold record, capable, perhaps, of exposing gross instances of incompetence but often giving no clue to the erosion of zeal which may ensue from divided loyalty. Accordingly, where the conflict is real, as it is here, a denial of the right to effective representation exists, without a showing of specific prejudice.

Zuck v. Alabama, 588 F.2d 436, 439 (5th Cir. 1979). See *Glasser v. United States*, 315 U.S. 60, 76 (1942)("[t]o determine the precise degree of prejudice sustained ... *is at once difficult and unnecessary*"; "[t]he right to have the assistance of counsel *is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial on account of conflicting interests*")(emphasis added). See also, e.g., *United States v. Schwarz*, 283 F.3d 76, 91 (2d Cir. N.Y. 2002)(under Sixth Amendment, prejudice is presumed where a conflict exists; claimant need only establish an "adverse effect" on counsel's performance), citing *Cuyler v. Sullivan*, 446 U.S. at 348; *United States v. Malpiedi*, 62 F.3d 465, 469 (2d Cir. 1995)("`once the defendant establishes that there was an actual conflict, he need not prove prejudice, but simply that a 'lapse in representation' resulted from the conflict.'" "To prove a lapse in representation, a defendant must 'demonstrate that some 'plausible alternative defense strategy or tactic might have been pursued,' and that the 'alternative defense was inherently in conflict with or not undertaken due to the

attorney's other loyalties or interests')(emphasis added); *Stephens v. United States*, 595 F.2d 1066, 1067 (5th Cir. 1979)(prejudice need not be shown under Sixth Amendment - "to hold otherwise would engage a reviewing court in unreliable and misguided speculation as to the amount of prejudice suffered by a particular defendant. An accused's constitutional right to effective representation is too precious to allow such imprecise calculations"); *Atley v. Ault*, 21 F. Supp. 2d 949, 955 (Iowa 1998)(a conflict exists when an attorney is placed in a situation conducive to divided loyalties ... and can include situations in which the caliber of an attorney's services "may be substantially diluted") (internal citations omitted).

STATEMENT OF ISSUES
OF LAW RAISED BY THE APPEAL

I. It is long established that there is an "actual" or "genuine" conflict of interest where conflicting interests or loyalties are "inherent" in the circumstances. See cases cited, *supra* at pp. 29-31. Accordingly, in 2010 the Supreme Judicial Court described an actual conflict as one that must be "inherent in the situation." *Mosher*, 455 Mass. at 120. However, for the first time in the history of this Court's conflict of interest jurisprudence, language was added to describe an actual conflict as one where "no impartial observer could reasonably conclude that the attorney is able to serve a defendant with undivided loyalty." *Id.* Since *Mosher*, this language has been used in

one other Supreme Judicial Court decision, also in 2010. *See Commonwealth v. Stote*, 456 Mass. 213, 218 (2010). The Court has never expounded upon what this added language means and, if it is to be applied on review, how it is to be applied. In the case at bar, the Commonwealth asserts that this language means that, on appeal, "if even one impartial observer could conclude that counsel could serve with undivided loyalty, then the [conflict of interest] claim must fail" (C.Br.36).⁸

In light of the above, several issues arise. If applied literally in accordance with the Commonwealth's assertion, the Court's added language appears to indicate that reviewing appellate justices, presumed to be impartial, are substantially guided by whether any one justice, or other hypothetical impartial observer in existence anywhere, "could" conclude that counsel "could" be loyal to his client, notwithstanding the conflicting circumstances. This introduces into the review a subjective exercise that subrogates deference to the discretion exercised by the judge below who, after conducting evidentiary hearings, has made conclusions of law that are inextricably intertwined with evaluations of credibility and findings of fact.

⁸ Only two Appeals Court decisions, both unpublished, have repeated the "no impartial observer" language, both without explication. *Commonwealth v. Rivera*, 88 Mass. App. Ct. 1115 (2015) (unpublished); *Commonwealth v. Brown*, 87 Mass. App. Ct. 1132 (2015) (unpublished).

More problematic, such a standard is incompatible with jurisprudence governing actual conflicts of interest. Under art. 12, where inherently conflicting loyalties exist, those conflicting circumstances mandate reversal, without regard to whether the attorney was capable of subjectively resisting the conflict so as not to cause prejudice. *E.g.*, *Martinez*, 425 Mass. at 388. If the standard is now whether a reviewing justice or any other hypothetical impartial observer "could" conclude that, notwithstanding the inherently conflicting circumstances, the attorney "could" remain loyal to the client, the standard for an actual conflict has changed from whether there were inherently conflicting interests, on the one hand, to whether it is possible for an attorney to resist the conflict relative to the client who is asserting a claim, on the other hand. Such a question is, in essence, focused on whether the attorney was capable of avoiding prejudice to the client. This modifies prior jurisprudence holding that under art. 12 a claimant need not address questions of prejudice once inherently conflicting circumstances have been established. *See, e.g., id.* Similarly, it undermines prior jurisprudence by "putting a defendant in the untenable position ... [of being] put to the burden, perhaps insuperable, of probing the resolve and the possible mental conflict of counsel...." Contrast, *e.g., id.*

Finally, if the standard has changed in accordance with the Commonwealth's assertion, a significant issue

concerns whether the Massachusetts standard is now more burdensome than, and thereby in violation of, the Sixth Amendment to the United States Constitution. No state anywhere in the country applies a standard that permits an actual conflict of interest claim to suffer defeat because any one impartial observer anywhere "could" possibly conclude that the attorney "could" possibly remain loyal despite conflicting circumstances.

II. A rather limited variety of conflict of interest cases have come before the Supreme Judicial Court. Notwithstanding, this Court has articulated conflict of interest principles that are informed by our Rules of Professional Conduct and the vital need to preserve conflict free legal representation in our adversary system. (See law described, *supra* at pp. 29-31) This case gives rise to questions whether, in light of the similar live issues in each highly publicized and simultaneously unfolding case, representation of Joseph Cousin while lead counsel of record defending police misconduct claims in Drumgold, pursuant to a lucrative contract with the BPD/City of Boston, is within the scope of actual conflict of interest principles as was determined by the Superior Court Judge. The Commonwealth asserts that actual conflicts of interest must fit within rigid factual categories purportedly established by this Court's case law. The defense strongly disagrees.

III. Seven years after Mr. Cousin's arrest and just three weeks before commencement of his second trial,

attorney William White received information that additional fingerprints had been pulled from a vehicle by police officers Leblanc and McLaughlin in 2002. Those prints appeared to corroborate a 15-year old's initial 2002 identification of the real perpetrators during a more than one hour "off-tape" interrogation by Detective Keeler that Keeler and other present detectives concealed by omission, without notes, reports, or any other documentation.

This newly disclosed evidence -- not available during the previous 2004 trial -- provided further evidence of potential police misconduct and could have been used to bolster the defense that Mr. Cousin had been targeted and "set up" by the police as believed by the first jury. Mounting such a defense, however, required attorney White to investigate and pursue accusations against McLaughlin, who Mr. White's firm, Davis, Robinson & White, LLP, defended against accusations of framing Stephan Cowans with fingerprint evidence.

These circumstances add to the issues presented in issue II above: (1) whether this new evidence was capable of contributing to an actual conflict by furthering the simultaneous, contrary obligations to both attack and defend conduct occurring in the Boston Police Department during two simultaneous, highly publicized cases (Drumgold & Cousin); and (2) whether this new evidence was capable of contributing to an actual conflict by requiring an attorney unrestrained in the ability to make public accusations that

McLaughlin had engaged in conduct that already resulted in millions of dollars in liability to the BPD/City of Boston, when doing so was contrary to the personal and economic interests Mr. White had in an ongoing, lucrative contractual relationship with the City.

A third, independent issue arises: whether circumstances requiring Mr. White to investigate and potentially pursue accusations against McLaughlin, who his firm defended against similar fingerprint misconduct in Cowans, was capable of creating or contributing to an actual conflict of interest under our governing law.⁹

ARGUMENT

I. THIS COURT SHOULD MAKE CLEAR THAT THE ADDITIONAL LANGUAGE USED IN TWO 2010 CONFLICT OF INTEREST CASES DOES NOT CREATE A SUBJECTIVE STANDARD ON REVIEW, DOES NOT SUBROGATE DEFERENCE TO THE SUPERIOR COURT JUDGE'S DISCRETION, AND WAS NOT INTENDED TO FUNDAMENTALLY ALTER THE REQUIREMENTS TO ESTABLISH AN ACTUAL CONFLICT OF INTEREST.

⁹ The issues set forth in I - III above also involve certain subsidiary issues of law. For example, throughout this litigation, the Commonwealth has asserted that where a partner at Davis, Robinson & White, LLP took responsibility for handling a case, and where the mechanism for distributing income at the firm was based on one's labor (i.e., you keep what you bill), each partner also functioned -- depending on the case -- as an independent attorney, notwithstanding being held out to the public as part of a limited liability entity (see pp. 12-13, *supra*). According to the Commonwealth, this makes principles of imputed disqualification inapplicable. Mr. Cousin asserts this is incorrect and misunderstands the law. Notwithstanding, such issues are not addressed here, as they do not appear necessary to providing the Court with a basis to evaluate this request for direct review.

The determinative question when evaluating an actual conflict of interest claim is whether conflicting interests or loyalties were "inherent" in the situation. *E.g.*, *Mosher*, 455 Mass. at 120. This Court should make clear that additional language used for the first time in two 2010 conflict cases regarding "no impartial observer" and evaluating the attorney's "ab[ility]," *see id.*, *Stote*, 456 Mass. at 218, were intended to emphasize that the actual conflict must be "inherent" in the objective circumstances of representation as established by evidence. That language was not intended to transform the standard on appellate review into an evaluation whether "even one impartial observer could conclude that counsel could serve with undivided loyalty" as the Commonwealth claims (C.Br.36).¹⁰

Supplanting or mixing the "inherent in the circumstances" standard with a "no impartial observer" evaluation that is focused on the attorney's ability has at least three consequences. **First**, it transforms the standard to be applied by incorporating a subjective exercise where

¹⁰ In other words, the ultimate question is whether the evidence presented has established circumstances with inherently conflicting obligations/loyalties, such that a conflict exists for an attorney in those circumstances. The focus is properly on the objective circumstances. The ultimate question is not focused on the attorney and what the attorney was capable of doing or not doing given the conflicting circumstances as determined by any "one" actual or hypothetical impartial observer anywhere. *See Mosher*, 455 Mass. at 120 (adding language interpretable as an assessment of what "the" attorney was "able" to do relative to "the defendant.>").

reviewing appellate justices, presumed to be impartial, are substantially guided by whether any "one" justice, or other hypothetical impartial observer in existence anywhere, "could" conclude that counsel "could" be loyal to his client, despite the circumstances. Such a standard risks subrogating deference to the discretion exercised by the judge below who, after conducting evidentiary hearings, has made conclusions that are inextricably intertwined with first hand evaluations of credibility and findings of fact.¹¹

Second, such a standard is incompatible with jurisprudence handed down over decades by this Court. Under art. 12, where inherently conflicting obligations exist, those conflicting circumstances mandate reversal, without regard to whether the attorney was capable of resisting the conflict so as not to cause prejudice to the defendant. See, e.g., *Martinez*, 425 Mass. at 388. Application of a standard that focuses on the question whether any actual or hypothetical impartial observer "could" conclude that the attorney "could" remain loyal to "the defendant" notwithstanding conflicting circumstances, changes the determinative question to whether the attorney was "able" to resist the conflict. Such a question is, in essence, focused on whether the attorney was capable of avoiding

¹¹ Any standard of law that turns on the possibility of a single conclusion from a single -- even hypothetical -- person, is itself a troubling concept and appears near non-existent in legal jurisprudence.

prejudice. This undermines extensive prior jurisprudence holding that, under art. 12, to establish an actual conflict a claimant need only establish that conflicting interests or loyalties were inherent in the circumstances, not questions of prejudice. See *Martinez, supra* at 388; *Michel*, 381 Mass. at 454. Similarly, this standard would undermine prior jurisprudence by "putting a defendant in the untenable position ... [of being] put to the burden, perhaps insuperable, of probing the resolve and the possible mental conflict of counsel..." Contrast, e.g., *Martinez, supra* at 388; *Hodge*, 386 Mass. 169-70.

Finally, if the existence of an actual conflict turns on the question whether any "impartial observer" anywhere "could" conclude that the attorney "could" remain loyal despite the established conflicting circumstances, the standard in Massachusetts is unlike any standard throughout the country. Such a standard is more burdensome than, and thereby in violation of, the Sixth Amendment to the United States Constitution. See, e.g., Federal law cited *supra* at pp. 31-33; *Florida v. Powell*, 559 U.S. 50, 71 (2010)(when applying conflict of interest principles, "the federal Constitution sets the floor, not the ceiling").

II. THIS COURT SHOULD RULE THAT ITS BODY OF JURISPRUDENCE HAS NEVER CREATED EXCLUSIVE, RIGID FACTUAL CATEGORIES, ONE OF WHICH MUST BE PRESENT BEFORE PRINCIPLES GOVERNING ACTUAL CONFLICTS OF INTEREST MAY BE APPLIED.

As this Court has acknowledged, it has not been afforded the opportunity to decide a wide variety of

conflict of interest cases. See *Croken*, 432 Mass. at 272 (noting that most SJC cases have concerned problems arising from representation of parties by members of same law firm). *Mosher*, 455 Mass. at 820 (describing cases that have been "typical[]"). Throughout this litigation, the Commonwealth has asserted that the rather limited variety of actual conflict cases this Court has decided establishes a body of exclusive circumstances that can comprise an actual conflict. Judge Sanders rejected that assertion (Attachments at 65). The Supreme Judicial Court should affirm that judgment.¹²

The circumstances at bar are within the scope of actual conflict of interest principles. See introduction at pp. 1-6 and overview of evidence at pp. 8-29; see R.30 decision finding actual conflicts of interest due to, *inter alia*, concurrent representation in Drumgold and personal economic interests.) To hold otherwise would contradict the professional rules of conduct this Court has repeatedly

¹² The Commonwealth has asserted that an actual conflict of interest can only be found where an attorney simultaneously represents codefendants with inconsistent or contradictory lines of defense; where an attorney or associate maintains a close relationship with a material prosecution witness; where the attorney represents an un-sentenced prosecution witness who testifies in the same matter in which the firm currently represents the defendant; or where an attorney has a business interest "for preferring a verdict that's unfavorable to the client." (Tr.3/11/15:83-85.) See also, e.g., C.Br.42.

relied on, *see, e.g., Perkins*, 450 Mass. 851-52, to govern and inform its analyses.¹³

Cases from across the country -- State and Federal -- affirm that the circumstances at bar and others far broader may comprise an actual conflict of interest.¹⁴

¹³ See Mass. R. Prof. Conduct 1.7 (a) and (b) entitled "Conflict of Interest: Current Clients" (conflict of interest exists where representation "will be directly adverse to another client," or where a client will be "materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests"); See also Rule 1.7, Comment [4]: "Loyalty to a client is also impaired when a lawyer *cannot consider, recommend or carry out* an appropriate course of action for the client *because of the lawyer's other responsibilities or interests*. The conflict in effect *forecloses alternatives* that would otherwise be available to the client" (emphasis added); Comment [6]: "The lawyer's own *interests should not be permitted to have an adverse effect* on representation of a client" (emphasis added); and Comment [8]: "Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, *even if the other matter is wholly unrelated*" (emphasis added); ABA Model Rule 1.7 (same). *Restatement (Third) of The Law Governing Lawyers* § 131, at 365 (1998)(an attorney may not represent two clients "if there is a substantial risk that the lawyer's representation of either would be materially and adversely affected by the lawyer's duties to the other").

¹⁴ See *e.g., United States v. Schwarz*, 283 F.3d 76, 91-92 (2d Cir. N.Y. 2002)(defendant-police officer's conviction reversed because victim-accuser also sued police union in separate civil suit and law firm representing defendant-police officer had contract with police union; unwaivable actual conflict of interest existed under 6th Amendment because firm "had an unalloyed duty to the [police union] as [its] client to refrain from any conduct injurious to its interests" and attorney "had a strong personal [economic] interest in refraining from any conduct to which the [police union] might object"); *Zuck v. Alabama*, 588 F.2d 436, 439 (5th Cir. 1942)("[t]he law firm which served as

counsel for Zuck in his murder trial also represented, in an unrelated civil matter, the State prosecutor"; circumstances were "inherently conducive to divided loyalties"; court rejected argument that prosecutor was not real party in interest -- "the defense attorneys were subject to the encumbrance that the prosecutor might take umbrage at a vigorous defense of Zuck and dispense with the services of their firm. Indeed, the potential prejudice arising from the conflict here is even greater than that found in *Castillo*, in which the danger of ineffective representation was limited to the cross-examination of a single prosecution witness. Here, the conflict could conceivably have infected the entire trial"). *State v. Gregory*, 612 S.E.2d 449, 450-451 (S.C. 2005)(defendant's attorney also represented Assistant Solicitor General in unrelated divorce matter -- "The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client"; "the Sixth Amendment requires that a defendant may not be represented by counsel who might be tempted to dampen the ardor of his defense in order to placate his other client. ... This possibility is sufficient to constitute an actual conflict as a matter of law"); *Ethics Digest: 2004-21, Ass't. District Attorney: Private Criminal Defense Practice; Disqualification; Conflict of Interest*, 27 Pennsylvania Lawyer 26 (2005)(limited temporary appointed to prosecute specific matters within county created conflict of interest with the attorney's criminal defense practice in same county and required consent of all parties involved); *Opinions of the General Counsel: City Attorney Who is Also Defense Attorney in City Has: Waivable Conflict of Interest*, 68 Ala. Law 162 (2007)(because other attorneys within law firm represented municipality in civil matters, attorney had a conflict of interest when representing criminal defendant in same city -- attorney was simultaneously representing clients with directly adverse interests); *Franklin v. Callum et al*, 146 N.H. 779, 781-782 (2001)(attorneys representing defendant NH/VT Solid Waste Project and its director had conflict of interest because of their client, the New Hampshire District, who despite no involvement in immediate case, had adverse interests); *State v. Brown*, 853 P.2d 851, 856-59 (Utah 1992)(defendant's attorney worked part time for City as prosecutor; "Counsel may be similarly reluctant to strongly attack

inappropriate police conduct"); *In re California Cannery and Growers v. Bank of America, et al.*, 74 B.R. 336, 342 (1987)(law firm had conflict with defendant bank because it opposed defendant in another proceeding -- "an attorney may not accept representation adverse to a *present* client, even if it is wholly unrelated to the matter on which the attorney represents the client"); *United States v. Marin*, 630 F. Supp. 64, 66 (N.D. Ill. 1985)(defendant's attorney, who harbored the desire to ingratiate himself with U.S. Attorney's Office relative to a personal matter, "may have done less than he might otherwise have done for his client.... Convictions should not be allowed to stand, nor sentences be served in the presence of such doubt"); *People v. Castro*, 657 P.2d 932, 945 (Colo. 1983)(defense attorney's representation of the district attorney on criminal charges of overspending his office budget, while simultaneously representing the defendant on a criminal charge of murder, created a conflict of interest, notwithstanding the district attorney did not participate in the trial of the case -- "What is critical, in our view, is the presence of a real and substantial conflict that placed the defense attorney in a situation inherently conducive to and productive of divided loyalties"); *People v. Barboza*, 627 P.2d 188, 188-91 (Cal. 1981)(conflict of interest existed because contract between public defender and county created financial incentive not to identify conflicts of interest -- there is "a real and insoluble tension, created by the contract, between the defender's conflicting interests"); *People v. Fife*, 392 N.E.2d 1345, 1348 (Ill. 1979)("we hold that a conflict of interest exists where defense counsel is a special assistant Attorney General, even though limited to specified noncriminal work, and his client in a criminal case is inadequately informed of the affiliation with the Attorney General and fails to effect a knowing and intelligent waiver"); *State v. Boone*, 380 A.2d 1158, 1159-1160 (N.J. Super. 1977)(conflict existed because attorney who represented defendant from work-related charge had an associate in same firm that represented defendant's employer in similar but unrelated matter); *People v. Coslet*, 364 N.E.2d 67, 69-71 (Ill. 1977)(defense attorney who was also involved in administering relative's estate had conflict of interest because conviction "raised the possibility that estate would be enriched"); *People v. Kester*, 361 N.E.2d 569 (Ill. 1977)(defendant's attorney previously worked for State Attorney and appeared in routine

III. MR. WHITE'S FIRM DEFENDED ROSEMARY MCLAUGHLIN AGAINST ACCUSATION OF FINGERPRINT MISCONDUCT IN THE COWAN'S CASE. THE RECEIPT OF NEW FINGERPRINT INFORMATION THAT REQUIRED MR. WHITE TO INVESTIGATE AND POTENTIALLY ACCUSE MCLAUGHLIN OF FURTHER FINGERPRINT MISCONDUCT IN MR. COUSIN'S HIGHLY PUBLICIZED TRIAL CREATED AN INDEPENDENT BASIS FOR AN ACTUAL CONFLICT OF INTEREST.

The receipt of new fingerprint information implicating McLaughlin contributed to the actual conflicts that arose from Mr. White's concurrent representation of both Drumgold and Cousin while maintaining a lucrative contract with the BPD/City of Boston (see above). The fact that Mr. White was called upon to investigate and very publicly accuse

manner in case; court relied on U.S. Supreme Court precedent and reversed the conviction because "the attorney might be subject to subtle influences which could be viewed as adversely affecting his ability to defend his client in an independent and vigorous manner"); *People v. Rhodes*, 524 P.2d 363. 364-66 (Cal 1974)(conflict existed where defendant's lawyer was also employed as city attorney, even though duties for city did not directly conflict with representation of defendant; "[a] city attorney in his capacity as defense counsel might also be influenced to dilute his criticism of local police conduct even though the situation calls for stressing the impropriety of police activity"; "Such a conflict of interest would operate to deprive a criminal defendant of the undivided loyalty of defense counsel to which he is entitled"). *Atley v. Ault*, 21 F. Supp. 2d 949, 955-960(Iowa 1998)(granting writ of habeas corpus where defense attorney was going to take a position with the County Attorney's office -- attorney would "be risking the good will of his future employer"; "even the most conscientious advocate may unintentionally and spontaneously belie inner conflict and thereby substantially erode his effectiveness"; "the employment issue alone constitutes sufficient ground to grant Atley's petition for the Iowa Supreme Court's failure to require new counsel"), *affirmed*, 191 F.3d 865 (8th Cir. 1999).

McLaughlin of the same misconduct his firm had defended her against in *Cowans* created an independent conflict of interest as well.

This case does not simply involve examining a former client about some limited factual circumstance unrelated to accusations of misconduct at issue during the attorney's prior representation. It involves investigating and very publicly attacking a former client (see White testimony that Cousin's case, like Drumgold, was a "very high profile" matter and "all over the news" (Ev.Hrg.I/48, 54-55, 103, 140-141)), who is still associated with Mr. White's former partner, and who is still suffering the fallout from fingerprint misconduct in *Cowans* (Ev.Hrg.II/50). The Rules of Professional Conduct guide legal analysis in these circumstances.¹⁵

¹⁵ See Mass. R. Prof. C. 1.9 (a) ("A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client"); Mass. R. Prof. C. 1.9 (b)(a "lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client (1) whose interests are materially adverse to that person; and (2) about whom the lawyer had acquired information ..."). See Mass. R. Prof. C. 1.9 Comment [6] ("A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients"; Comment 9 to Mass. R. prof. C. 1.10 ("The fact that the lawyer does not immediately remember any details of the former client's

Our established conflict of interest principles as reflected in the Rules of Professional Conduct guide lower courts that are responsible for addressing issues of disqualification on a far more regular basis than our appellate courts.¹⁶

The presence of an actual conflict at bar is consistent with other cases from around the country.¹⁷

representation does not mean that he or she does not in fact possess confidential information material to the matter"). See also Mass. R. Prof. C. 1.10 (d) ("When a lawyer becomes associated with a firm ("new firm"), the new firm may not undertake to or continue to represent a person in a matter that the firm knows or reasonably should know is the same or substantially related to a matter in which the newly associated lawyer (the "personally disqualified lawyer"), or the former firm, had previously represented a client whose interests are materially adverse to the new firm's client unless" the lawyer (1) has no material information or (2) had no involvement or information and is screened at the new firm.)

¹⁶ See, for example, *See Levi v. Mukdissi*, 2000 Mass. Super. LEXIS 334 at 8-10 ("an attorney should be disqualified because of a conflict arising from the representation of a former client, that is, current representation must be adverse to the interests of the former client in the same or a substantially related matter. Before a judge disqualifies an attorney, the record must be clear that there is a substantial risk of material and adverse effects of the continued representation on the interests of the present or a former client").

¹⁷ See, e.g., *Sullivan County Regional Refuse District v. Town of Acworth*, 686 A.2d 755, 758 (NH 1996) (conflict of interest existed because attorney for town had previously represented District and was taking position adverse to District; "even in the absence of any confidences, an attorney owes a duty of loyalty to a former client that prevents that attorney from attacking, or interpreting, work she performed, or supervised, for the former client"); *Johnson v. Haberman & Kassoy et al.*, 201 Cal. App. 3d 1468,

STATEMENT OF REASONS WHY
DIRECT APPELLATE REVIEW IS APPROPRIATE

The issues raised above are constitutional in nature, concern the respective conflict of interest standards to be applied under our State and the Federal Constitutions, concern the scope of our law, and arise out of cases that have been the subject of immense public interest. Each of these facets supports direct review by the Supreme Judicial Court. See Mass. R. App. P. 11(a).

Respectfully submitted,
JOSEPH COUSIN,
By his attorney,

A stylized, handwritten signature in black ink, appearing to be 'R. Shaw'.

Robert F. Shaw, Jr.

1475 (1988) ("an attorney cannot accept employment or otherwise act adversely to his former client on a matter of controversy in which he formerly represented the client"); *Humphrey v. State*, 537 S.E.2d 95, 97-98 (Ga. 2000) (part time prosecutor's private firm employed an attorney who represented defendant in a past civil matter, both cases touched upon defendant's drinking habits -- judgments reversed).

CERTIFICATION PURSUANT TO MASS. R. APP. P. 16(k)

I, Robert F. Shaw, Jr., hereby certify that the within Application for Direct Appellate Review complies with the rules of Court that pertain to the filing of said applications.

A stylized, handwritten signature in black ink, consisting of a large, flowing 'R' followed by a smaller 'S' and a final flourish.

Robert F. Shaw, Jr.

ATTACHMENTS

Sampling of Media Pertaining to Boston Police
Department, Dennis Leblanc, Rosemary McLaughlin, &
Detective Keeler. 2-3

Sampling of Local Media Pertaining to
Commonwealth v. Cousin. 4-10

Sampling of Local Media Pertaining
to *Drumgold* Case. 11-15

Docket, *Commonwealth v. Joseph Cousin*. 15-39

Memorandum of Decision and Order Regarding Need For
Evidentiary Hearing on Defendant's Motion for a New
Trial. 40-44

Memorandum of Decision and Order on Defendant's Motion
for a New Trial. 45-68

**Sampling of Media Pertaining to Boston Police Department,
Dennis Leblanc, Rosemary McLaughlin, & Detective Keeler**

- D. Bernstein, *Framed: The Boston Police Investigation of Stephan Cowans Led to Wrongful Conviction. Was it Incompetent - or Corrupt?* Boston Phoenix, Feb. 8, 2008 ("[Leblanc] did more than conceal it"; "the Smith [investigative] team concluded in its report that Leblanc doctored a large court display of the supposed match, to deceive the jury"; "the fingerprint enlargements presented by Leblanc in court 'show evidence of manipulation to hide or obscure dissimilarities'")
- J. Saltzman, *City Spends Heavily to fight Suit* Boston Globe, January 25, 2008 ("The City of Boston has spent more than \$1 million on outside lawyers to fight a lawsuit filed by a man [Drumgold] who spent 15 years in prison before prosecutors concluded he was wrongly convicted in one of the most notorious murders in Boston in the past quarter century"; "So far, the city has paid ...William White Jr. \$207,434.00")
- J. Saltzman, *Jury Acquits Man of Murder Charge*, Boston Globe, August 8, 2007 ("A Roxbury man who testified that a Boston homicide detective [Daniel Keeler] manipulated him into falsely confessing he killed a teenager in 2004 was acquitted yesterday of first-degree murder charges")
- S. Smalley, *Detective Might Face Felony Charge*, Boston Globe, October 28, 2006 (addressing legal complaint against Detective Keeler after he was caught on video stealing sunglasses from a store during a robbery investigation)
- D. Bernstein, *Shades of Keeler*, Boston Phoenix, September 13, 2006 ("After discussing 12 years of Keeler cases with prosecutors, defense attorneys, investigators, and others - and reviewing court documents, transcripts, and other case materials - one detects a distinct pattern, particularly in high profile cases, such as those involving murdered children. That pattern includes vague circumstances leading Keeler to a suspect; information never making it to the defense counsel...")
- D. Bernstein, *Boston Agrees to Pay 3.2 Million to Stephen Cowans*, The Phoenix, Aug. 10, 2006

- D. Bernstein, *Keeler Poison Spreads to Federal Court*, The Boston Phoenix, May 15-24, 2005 (addressing "jury distrust of Keeler's [interrogation] techniques" - another defendant testified that, "He kept initiating, talking to me about a certain incident that occurred")
- F. Richardson & M. Mulvihill, *Innocents Point Finger at Mr. Homicide*, Boston Herald, May 4, 2005 ("Last week, Keeler's combative interrogation manner came under attack when a jury ... acquitted Kyle Bryant, now 22, of the horrific 1999 murder of his pregnant 14-year-old girlfriend. 'He said: I'm going to make you say you were there. If you don't, I'll use Lord [Hampton, co-defendant] to set you up. I'll put your mother on the news,' Bryant testified before his trial. 'I started crying. I was scared to death. I'm thinking: Do what he says.'")
- D. Bernstein, *Reasonable Bias*, The Boston Phoenix, January 7-13, 2005 ("The Bush jury heard Detective Keeler actually admit to lying in his reports, as well as to failing to collect important physical evidence at the crime scene - and then jurors were asked to believe his version of how he obtained eyewitness identifications")
- R. Ranalli, *Reilly Won't Charge Two Police Analysts*, Boston Globe, June 25, 2004 (Attorney general said that "none of the independent fingerprint experts who reviewed the [Cowans] case including experts from the FBI could conceive of how the two prints could have been mistaken for one another." "'It wasn't even close,' he said. 'This was no simple mistake.'")
- M. Mulvihill & F. Richardson, *Misfits Dumped into Cop ID Unit*, Boston Herald, May 16, 2004 ("BPD Commissioner Kathleen O'Toole said she is revamping the entire ID unit")
- M. Mulvihill, *Probe Fingers Unit*, Boston Herald, May 8, 2004 (Attorney General's "investigators are probing the work of BPD fingerprint technicians Dennis LeBlanc and Rosemary McGlaughlin")
- Weber & Rothstein, *Man Freed After Six Years; Evidence was Flawed*, Boston Herald, Jan. 24, 2004
- J. Saltzman, *Detective Admits Falsehood in Slaying Report*, Boston Globe (2004)

Sampling of Local Media Pertaining to
Commonwealth v. Cousin

(As of January, 2013, Google returned nearly 2,000 separate internet search results containing the names "Joseph Cousin" and "Trina Persad")

- B.R. Ballou, *A Cry of Innocent at Sentencing*, Boston Globe, October 7, 2009
- B.R. Ballou & A. Ryan, *Man Convicted in 11-Year-Old's Slaying to Serve 19 More Years, Insists Innocence*, Boston Globe, October 6, 2009
- Staff, *Man Gets Life in Murder of Girl in Jermaine Goffigan Park*, Dorchester Reporter, October 5, 2009
- D. Abel & A. Ryan, *Man Convicted of Killing Girl 10, in Roxbury Park*, Boston Globe, October 5, 2009
- A.Walker, *Reliving the Trauma*, Boston Globe, September 18, 2009
- B.R. Ballou, *Slain Child's Final Moments Recounted*, Boston Globe, September 17, 2009
- B.R. Ballou, *Retrial Begins in Girls Slaying*, Boston Globe, September 16, 2009
- L.J. Sweet, *Horrific Details Emerge in Slay Retrial*, Boston Herald, September 16, 2009
- B.R. Ballou, *Trial Opens in Case of Little Girl Killed in Gang Shootout*, Boston Globe, September 15, 2009
- M. McPhee, *Hub Cop Steps up to Collar Drive-by Suspects*, Boston Herald, September 26, 2007
- J. Saltzman, *Criminal Checks on Jurors OK'd During Trial*, Boston Globe, September 25, 2007
- Boston Globe City & Region Desk, *SJC: Man Can Be Retried in Killing of Girl, 10*, Boston Globe, September 24, 2007

- M. McPhee, *THE BEAT Let Boston Cops Solve T Slayings*, Boston Herald, September 17, 2007
- M. McPhee, *Too Young To Die*, Boston Herald, June 26, 2007
- M. McPhee, *THE BEAT; Families Need Justice for Loved-One's Slayings*, Boston Herald, November 27, 2006
- D.S. Bernstein, *Worst Homicide Squad in America*, Boston Phoenix, April 20, 2006
- M. McPhee, *THE BEAT; Gang-banger 'Superhero': I Never Thought I'd Get Shot*
Boston Herald, January 9, 2006
- M. McPhee, *Cops Beg Parents to Help End Chaos*, Boston Herald, January 4, 2006
- D.S. Bernstein, *It's Gotta be the Shirts; Menino's Attempt to Win the Confidence of Kids in the 'Hood will have the Opposite Effect*, Boston Phoenix, December 9, 2005
- J. Saltzman, *Defendant in Persad Killing Can Be Tried Again; Judge Blames Jurors for Mistrial*, Boston Globe, April 15, 2005
- S. Smalley, *No Perjury Charges Seen in Persad Mistrial*, Boston Globe, February 2, 2005
- B. English, *'They Are Not Going to Destroy My Life' Bernadette Fernandes Shoulders Loss and Grief without Bitterness*, Boston Globe, February 1, 2005
- J. Saltzman, *Defense Says DA Broke Law in Persad Case*, Boston Globe, January 27, 2005
- *Commentary: Letter To The Editor: Jury Made Scapegoat After DA Failed to Prove Case*, Massachusetts Lawyers Weekly, January 17, 2005
- D.S. Bernstein, *Reasonable Bias; For The Past Year, Wrongfully Convicted Men Have Paraded Out of Prisons. Now We're Surprised That Jurors Are Skeptical?* Boston Phoenix, January 7, 2005

- *NEWS in Brief; Lying Juror Pays Fine, Clears Up Warrant*, Boston Herald, December 31, 2004
- The Associated Press, *Judge Seeks More Stringent Juror Selection*, Providence Journal, Providence R.I., December 30, 2004
- J. Saltzman, *A Top Judge Urges Better Juror Screening*, Boston Globe, December 29, 2004
- M. Barnicle, *Corrupted Jury Murdered Trina Persad Second Trial*, Boston Herald, December 29, 2004
- D. Slack, *Persad Case Juror Regrets Acquittal; Says Panel Faced Racial Pressure*, Boston Globe, December 28, 2004
- H. Manly, OP-Ed; *Justice Again Victimized in Suffolk County*, Boston Herald, December 28, 2004
- L.J. Sweet, *HERALD EXCLUSIVE; Tearful Mom: 'I See Pain' - Wants Case Closed for Slay Suspect*, Boston Herald, December 26, 2004
- M. McPhee, *HERALD EXCLUSIVE; 'They Took Everything' - Slain Daughter's Mom Struggles to Find the Joy in Christmas*, Boston Herald, December 26, 2004
- M. McPhee & L.J. Sweet, *HERALD EXCLUSIVE; Ex-con Mom Tried to Silence Witnesses; Men Wore 'Stop Snitching' Shirts to Accused Killer's Trial*, Boston Herald, December 24, 2004
- M. Barnicle, *Finding Hope, Courage Amid Kids' Tragedies*, Boston Herald, December 23, 2004
- Globe Editorial, *Dishonest Justice*, Boston Globe, December 24, 2004
- D. Weber, L.J. Sweet & M. McPhee, *DA Vows to Jail Lying Jurors*, Boston Herald, December 24, 2004
- J. Saltzman & J. Ellement, *Police Open Probe of Five Persad Jurors*, Boston Globe, December 24, 2004

- J. Saltzman, *Judge Halts Murder Trial, Rips 3 Jurors; Cites Failure to Disclose Criminal Pasts*, Boston Globe, December 23, 2004
- The Associated Press, *Tainted Jury Forces Mistrial*, Cape Cod Times, December 23, 2004
- D. Weber, *State Lets Criminal Questionnaires Slide*, Boston Herald, December 23, 2004
- J. Saltzman, *Jury Acquits One in Girl's Slaying*, Boston Globe, December 22, 2004
- Associated Press, *Jury Acquits One Man in Girl's Killing; Deliberations Continue for Another*, Boston Globe, December 21, 2004
- *NEWS in Brief; Murder Trial Jury Foreman Replaced*, Boston Herald, December 18, 2004
- J. Saltzman, *Series of Turns Entangle Persad Jury*, Boston Globe, December 18, 2004
- J. Saltzman, *Man Found Guilty in '74 Slaying of Teen on Bicycle; Cold Case Squad Found Him in '94*, Boston Globe, December 16, 2004
- D. Weber, *Girl's Last Walk Called 'Death March'* Boston Herald, December 14, 2004
- J. Saltzman, *Closing Arguments Heard in Murder Case of Girl Slain in 2002*, Boston Globe, December 14, 2004
- *Fate of Alleged Murderers in Jury's Hands; Girl Shot While Playing with Family*
- TheBostonChannel.com, December 13, 2004
- *Mother in Court*, Boston Globe, December 10, 2004
- D. Weber, *Cop: Accused Kid Killer Denied Knowing Buddy*, Boston Herald, December 9, 2004
- *Taping of Interrogation Questioned in Trial*, Boston Globe, December 9, 2004

- *Man Denied Role in Persad Shooting Death*, Boston Globe, December 4, 2004
- J. Saltzman, *Witness in Persad Case Says He Changed Story*, Boston Globe, December 3, 2004
- J. Saltzman, *Teen Testifies 'Mission' Led to Shooting*, Boston Globe, December 2, 2004
- J. Saltzman, *Witness IDs Rivals in Shooting*, Boston Globe, December 1, 2004)
- P. Geizinis, *Screams Don't Echo Loudly Enough*, Boston Herald, December 1, 2004
- J. Saltzman & Ralph Ranalli, *Murder Trial Reveals a Code of the Street*, Boston Globe, November 24, 2004
- Associated Press, *Trial Opens I Shooting Death of 10-Year-Old Boston Girl*, Sun Journal-Lewiston, Maine, November 20, 2004
- J. Saltzman, *Witness Recounts Slaying of Girl, 10*, Boston Globe, November 20, 2004
- *Trial Starts for Men Accused in Child's Murder; Trina Persad, 10 Shot in June 2002*, TheBostonChannel.com, November 19, 2004
- *NEW ENGLAND IN BRIEF: Trial for 2002 Murder to Begin Today*, Boston Globe, November 19, 2004
- *NEW ENGLAND IN BRIEF; Jury Selection Set in Persad Murder*, Boston Globe, November 16, 2004
- *Jury Selection Set in Persad Murder*, Boston Globe, November 16, 2004
- D. Weber, *2nd Kid-Murder Trial Will Test DA, Hub Cops*, Boston Herald, November 14, 2004
- D. Weber, *Girl's 'Aunt' Recalls Day Gang Gunfire Took Her Life*, Boston Herald, November 10, 2004

- J. Hesslam, *Mother Recalls Slain Daughter's Final Moments*, Boston Herald, June 22, 2003
- M. Heuer, *Memory of Slain Hub Girl Takes Root in Schoolyard*, Boston Herald, June 14, 2003
- M.S. Rosenwald & J. Ellement, *Shots by Officer Seem Justified, DA Says*, Boston Globe, September 18, 2002
- *REGION in Brief; Three Arraigned in Persad Murder*, Boston Herald, September 10, 2002
- J. Jiang, *3 Indicted in 10-Year-Old's Killing*, Boston Globe, September 6, 2002
- D. Weber, *Teenager Will Be Third Defendant in Persad Case*, Boston Herald, September 6, 2002
- F. Richardson, *In Death's Wake, Call for Peace in Roxbury*, Boston Herald, July 8, 2002
- J. Russell & G. Rodriguez, *Mourning an 'Angel' Who Fell to Stray Shots*, Boston Globe, July 7, 2002
- J. Crittenden, *Cops Tried Intervention for Accused Killer of Girl*, Boston Herald, July 6, 2002
- E. Ramshaw, *Community Keeps Girl's Memory Alive Shrine Dedicated to Slain 10-Year-Old*, Boston Globe, July 5, 2002
- *Editorial; Keeping the Peace, But Not the Silence*, Boston Herald, July 5, 2002
- A.Walker, *No Hiding This Crime*, Boston Globe, July 4, 2002
- M.S. Rosenwald & J. Ellement, *2 Charged in Girl's Slaying Pair Allegedly Tried to Shoot at Rival Gang*, Boston Globe, July 4, 2002
- P. Gelzinis, *Vaunted 'Model' Miserably Fails One Little Girl*, Boston Herald, July 4, 2002
- E. Ramshaw & J. Healy, *Gang Feud Sparked Shooting, Police Officials Say*, Boston Globe, July 4, 2002

- D. Wedge, *Pair Have Long Rap Sheets; Cops Say Suspects in Notorious Street Gang*, Boston Herald, July 4, 2002
- J. Vennoch, *In Trina's World, Death Takes No Holiday*, Boston Globe, July 4, 2002
- J. Lindsay, *Boston Violence on Rise*, The Item, Sumter, S.C., July 4, 2002
- J. Lindsay, Associated Press, *Two Charged in Death of Girl at Boston Park*, The Free Lance-Star, Fredericksburg, VA, July 4, 2002

Sampling of Local Media Pertaining to Drumgold Case

(As of January, 2013, Google returned nearly 5,000 separate search results containing the terms "Shawn Drumgold" and "civil rights")

- Staff *Boston Judge Denies New Trial in Drumgold Case*, Boston Globe, August 19, 2011
- J. Bouboushian, *Judge OKs \$14M Award to Wrongly Convicted Man*, Courthouse News Service, September 6, 2011)
- J. Saltzman, *Retrial Starts in Drumgold Conviction Suit*, Boston Globe, September 11, 2009
- Associated Press, *Wrongfully Convicted Boston Man Awarded \$14M*, msnbc.com, October 22, 2009
- Anonymous, *History of the Case*, Boston Globe, October 22, 2009
- J. Saltzman, *US Jury Awards \$14M to Drumgold*, Boston Globe, October 22, 2009
- M. Stanelun, *Timeline in Drumgold Case*, Boston Globe, October 21, 2009
- J. Saltzman, *Drumgold Awarded \$14 Million in Civil Rights Trial*, Boston Globe, October 21, 2009
- Associated Press, *Wrongfully Convicted Boston Man Awarded \$14M*, WHDH.com, October 21, 2009
- J. Van Sack & O. Johnson, *Mistrial Bid Nixed in Shawn Drumgold Case*, Boston Herald, October 20, 2009
- S. Murphy, *Jury One Vote Away From Awarding Damages in Wrongful Conviction*, Boston Globe, October 20, 2009
- J. Saltzman & S. Murphy, *Jury Finds for Drumgold in Civil Rights Suit*, Boston Globe, October 14, 2009
- J. Saltzman, *Man, City Near Deal in Rights Lawsuit*, Boston Globe, November 26, 2009

- J. Saltzman, *Retired Detective Testifies in Drumgold Case*, Boston Globe, March 26, 2008
- J. Saltzman, *Judge Says Police Defied His Order on Drumgold*, Boston Globe, March 15, 2008
- J. Saltzman, *Lawyers Attack Credibility of Witness*, Boston Globe, March 7, 2008
- J. Saltzman, *Murder Witness Tells Why He Recanted*, Boston Globe, March 6, 2008
- J. Lindsay, *Witness Say He Led During Trial of Man Convicted in Murder*, SouthCoastToday.com, March 6, 2008
- J. Saltzman, *Witness in Drumgold Case Says He Made Up Testimony*, Boston Globe, March 5, 2008
- J. Saltzman, *Civil Rights Suit Against City Goes to Trial*, Boston Globe, March 5, 2008
- J. Saltzman, *Despite Impasse, 2 Jurors Say Lawsuit Had Its Merits*, Boston Globe, April 18, 2009
- *Jury in Boston Awards \$14M in Civil Rights Case*, Lawyers US, October 26, 2009
- The Associated Press, *City Spends Heavily to Fight Suit by Wrongfully Convicted Man*, SouthCoastTODAY.com, January 26, 2008
- J. Lindsay, *Witness Says He Lied in Man's Gang-Murder Trial*, Bangor Daily News, March 6, 2008
- J. Saltzman, *Civil Rights Suit Against City Goes to Trial*, Boston Globe, March 5, 2008
- J. Saltzman, *Judge Declares Mistrial in Drumgold's Civil Case*, Boston Globe, April 17, 2008
- J. Saltzman, *Judge Declares Mistrial on Final Claim in Drumgold Case*, Boston Globe, April 16, 2008
- J. Saltzman, *Plaintiff Details a Hell in Prison*, Boston Globe, April 15, 2008

- J. Saltzman, *Drumgold Testifies He Was Beaten in Prison and Called a 'Child Killer'*
Boston Globe, April 14, 2008
- J. Saltzman, *Jury Backs Boston Police in Rights Suit*,
Boston Globe, April 10, 2008
- J. Saltzman, *Jury Finds for Boston Police on all but One Charge in Drumgold Case*, Boston Globe, April 9, 2008
- B. McGrory, *Unfinished Justice*, Boston Globe, February 23, 2007
- *Man Suing City After Wrongful Conviction*,
TheBostonChannel.com, February 23, 2007
- S. Smalley, *Costs Soar to Fight Lawsuit by Ex-Prisoner City Spends Nearly \$600,000 on Lawyers*, Boston Globe, March 14, 2007
- P. Gelzinis, *In This Neighborhood, 'You Can Die At Any Time'* Boston Herald, April 1, 2007
- *Federal Court Rejects City's Argument in Wrongful Conviction Case*, WHDH.com, May 2, 2007
- S. Murphy, *US Judge Rejects City's Allegations in Drumgold Case; Ruling Supports Lawyer, Ex-Reporter*, Boston Globe May 2, 2007
- P. Gelzinis, *In This Neighborhood, 'You Can Die At Any Time'* Boston Herald, April 1, 2007
- S. Smalley, *Costs Soar to Fight Lawsuit by Ex-Prisoner City Spends Nearly \$600,000 on Lawyers*, Boston Globe, March 14, 2007
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TheBostonChannel.com, February 23, 2007
- L.J. Sweet, *Drumgold Gets Off Easy for Drug Bust; Man Cleared in Slaying, Was Nabbed Selling Crack*, Boston Herald, November 2, 2006

- M. Goldstein, *Beating the System*, Boston Globe, August 17, 2005
- D. Kennedy, *Good For Us, Phoenix Papers Take 18 NEPA Awards*, Boston Phoenix, February 11, 2005
- Radsken, *Sense of Style; Freedom Suits Them; Designer Kenneth Cole Dresses Wrongly Convicted For Success*, Boston Herald, August 5, 2004
- Soto, *Drumgold Sues Over Wrongful Conviction*, Boston Globe, June 4, 2004
- Associated Press, *Boston Man Who Served 15 Years for Girl Caught in Gang Crossfire Sues City, Police*, NewsLibrary.com, June 4, 2004
- *Maintaining Innocence, Man Sues Boston Police Officers, Drumgold Released After 15 Years in Prison*, TheBostonChannel.com, June 3, 2004
- J. Ellement, *Conviction Tossed, Prisoner is Freed as Incarcerated for 30 Years; Prosecutors to Weigh Retrial*, Boston Globe, May 21, 2004
- F. Richardson & M. Mulvihill, *Special Report: Justice Denied; Free at Last, Innocents Seek Help for Helpless*, Boston Herald, May 7, 2004
- M. Mulvihill & F. Richardson, *Special Report: JUSTICE DENIED; Mayor Pushes for 'Compensation Fund'* Boston Herald, May 6, 2004
- F. Richardson & M. Mulvihill, *Special Report: Justice Denied; 22 Bay State Men Wrongfully Jailed: Overzealous Cops, Shoddy Investigations, Lying Witnesses - How the System Failed*, Boston Herald, May 5, 2004
- Associated Press, *New Bills Aid Diabetics, Wrongfully Convicted*, Boston Globe, December 31, 2004
- D. Lehr, *4th Witness Recants in Drumgold Case*, Boston Globe, May 30, 2003

- R. Giola, *The More Things Change...*, Boston Globe, May 24, 2003
- Editorial, *Justice for Drumgold*, Boston Globe, May 17, 2003

0284CR10867 Commonwealth vs. Cousins, Joseph CKA Cousin, Joseph

Case Type	Indictment	Initiating Action:	MURDER c265 §1
Case Status	Open	Status Date:	09/04/2002
File Date	09/04/2002	Case Judge:	
DCM Track:	I - Inventory	Next Event:	06/22/2017

[All Information](#)
[Party](#)
[Charge](#)
[Event](#)
[Docket](#)
[Disposition](#)

Party Information**Commonwealth - Prosecutor**

Alias

Party Attorney

Attorney Bradley, Esq., David Stuart
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[More Party Information](#)

Cousins, Joseph - Defendant

Alias

CKA Cousin, Joseph

Party Attorney

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Phone Number

[More Party Information](#)

Stanton, Clerk, Hon. Joseph - Other interested party

Alias

Party Attorney

[More Party Information](#)

Party Charge Information**Cousins, Joseph - Defendant**

Charge # 1 : **265/1-0 - Felony** MURDER c265 §1

Original Charge 265/1-0 MURDER c265 §1 (Felony)

Indicted Charge

Amended Charge

Charge Disposition

Disposition Date 10/05/2009

Disposition Guilty Verdict - Lesser Included

Cousins, Joseph - Defendant

Charge # 2 : **266/28/F-0 - Felony** MOTOR VEH, RECEIVE STOLEN c266 §28(a)

Original Charge 266/28/F-0 MOTOR VEH, RECEIVE STOLEN c266 §28(a) (Felony)

Indicted Charge

Amended Charge

Charge Disposition

Disposition Date 10/05/2009

Disposition Guilty Verdict

Cousins, Joseph - DefendantCharge # 3 : **CONV -** Conversion Misc Action Code

Original Charge CONV Conversion Misc Action Code
Indicted Charge
Amended Charge

Charge Disposition

Disposition Date 10/05/2009
Disposition Not Guilty Verdict

Cousins, Joseph - DefendantCharge # 4 : **269/10/G-1 - Misdemeanor - more than 100 days incarceration** FIREARM WITHOUT FID CARD, POSSESS c269 §10(h)

Original Charge 269/10/G-1 FIREARM WITHOUT FID CARD,
 POSSESS c269 §10(h) (Misdemeanor - more than 100
 days incarceration)

Indicted Charge
Amended Charge

Charge Disposition

Disposition Date 10/05/2009
Disposition Guilty Verdict

Events

Date	Session	Location	Type	Event Judge	Result
09/09/2002 09:30 AM	Magistrate's Session		Arraignment		Held as Scheduled
09/23/2002 09:30 AM	Magistrate's Session		Pre-Trial Conference		Held as Scheduled
10/15/2002 09:30 AM	Criminal 1		Hearing		Held as Scheduled
11/12/2002 09:30 AM	Magistrate's Session		Hearing RE: Discovery Motion(s)		Held as Scheduled
12/19/2002 09:30 AM	Magistrate's Session		Hearing RE: Discovery Motion(s)		Held as Scheduled
12/19/2002 09:30 AM	Criminal 1		Bail Review		Held as Scheduled
01/15/2003 09:30 AM	Magistrate's Session		Status Review		Held as Scheduled
02/25/2003 09:30 AM	Magistrate's Session		Hearing RE: Discovery Motion(s)		Held as Scheduled
03/14/2003 09:30 AM	Magistrate's Session		Hearing RE: Discovery Motion(s)		Held as Scheduled
04/17/2003 09:30 AM	Criminal 1		Hearing		Held as Scheduled
05/19/2003 09:30 AM	Magistrate's Session		Status Review		Held as Scheduled
06/27/2003 09:30 AM	Magistrate's Session		Status Review		Rescheduled
07/28/2003 09:30 AM	Magistrate's Session		Evidentiary Hearing on Suppression		Not Held
09/15/2003 09:30 AM	Magistrate's Session		Evidentiary Hearing on Suppression		Canceled
10/10/2003 09:00 AM	Criminal 4		Trial Assignment Conference		Rescheduled
10/29/2003 09:00 AM	Criminal 4		Trial Assignment Conference		Held as Scheduled
12/22/2003 09:00 AM	Criminal 4		Evidentiary Hearing on Suppression		Rescheduled
01/05/2004 09:00 AM	Criminal 4		Evidentiary Hearing on Suppression		Held as Scheduled

Date	Session	Location	Type	Event Judge	Result
02/03/2004 09:00 AM	Criminal 4		Status Review		Held as Scheduled
03/04/2004 09:00 AM	Criminal 4		Status Review		Held as Scheduled
03/25/2004 09:00 AM	Criminal 4		Status Review		Rescheduled
04/05/2004 09:00 AM	Criminal 4		Hearing		Held as Scheduled
04/20/2004 09:00 AM	Criminal 4		Status Review		Held as Scheduled
09/10/2004 09:00 AM	Criminal 4		Status Review		Not Held
09/10/2004 02:00 PM	Criminal 3		Status Review		Held as Scheduled
10/04/2004 09:00 AM	Criminal 4		Jury Trial		Rescheduled
11/01/2004 11:00 AM	Criminal 3		Hearing		Held as Scheduled
11/10/2004 09:00 AM	Criminal 3		Hearing		Held as Scheduled
11/15/2004 09:00 AM	Criminal 3		Hearing		
11/16/2004 09:00 AM	Criminal 3		Jury Trial		Trial ends in a Mistrial
11/17/2004 09:00 AM	Criminal 3		Jury Trial		Trial ends in a Mistrial
11/18/2004 09:00 AM	Criminal 3		Jury Trial		Trial ends in a Mistrial
11/19/2004 09:00 AM	Criminal 3		Jury Trial		Trial ends in a Mistrial
11/23/2004 09:00 AM	Criminal 3		Jury Trial		Trial ends in a Mistrial
11/29/2004 01:00 PM	Criminal 3		Jury Trial		Trial ends in a Mistrial
11/30/2004 09:00 AM	Criminal 3		Jury Trial		Trial ends in a Mistrial
12/01/2004 09:00 AM	Criminal 3		Jury Trial		Trial ends in a Mistrial
12/02/2004 09:00 AM	Criminal 3		Jury Trial		Trial ends in a Mistrial
12/03/2004 09:00 AM	Criminal 3		Jury Trial		Trial ends in a Mistrial
12/06/2004 09:00 AM	Criminal 3		Jury Trial		Trial ends in a Mistrial
12/07/2004 09:00 AM	Criminal 3		Jury Trial		Trial ends in a Mistrial
12/08/2004 09:00 AM	Criminal 3		Jury Trial		Trial ends in a Mistrial
12/09/2004 09:00 AM	Criminal 3		Jury Trial		Trial ends in a Mistrial
12/10/2004 09:00 AM	Criminal 3		Jury Trial		Trial ends in a Mistrial
12/13/2004 09:00 AM	Criminal 3		Jury Trial		Trial ends in a Mistrial
12/14/2004 09:00 AM	Criminal 3		Jury Trial		Trial ends in a Mistrial
12/15/2004 09:00 AM	Criminal 3		Jury Trial		Trial ends in a Mistrial

Date	Session	Location	Type	Event Judge	Result
12/16/2004 09:00 AM	Criminal 3		Jury Trial		Trial ends in a Mistrial
12/17/2004 09:00 AM	Criminal 3		Jury Trial		Trial ends in a Mistrial
12/20/2004 09:00 AM	Criminal 3		Jury Trial		Trial ends in a Mistrial
12/21/2004 09:00 AM	Criminal 3		Jury Trial		Trial ends in a Mistrial
12/22/2004 09:00 AM	Criminal 3		Jury Trial		Trial ends in a Mistrial
01/21/2005 02:30 PM	Criminal 3		Hearing		Held as Scheduled
01/25/2005 02:00 PM	Criminal 3		Status Review		Rescheduled
03/11/2005 02:00 PM	Criminal 3		Hearing		Held as Scheduled
05/03/2005 02:00 PM	Criminal 6		Status Review		Rescheduled
07/26/2005 02:00 PM	Criminal 6		Status Review		Held as Scheduled
09/13/2005 02:00 PM	Criminal 6		Status Review		Rescheduled
10/27/2005 02:00 PM	Criminal 6		Status Review		Not Held
10/27/2005 02:00 PM	Criminal 10		Status Review		Held as Scheduled
01/10/2006 02:00 PM	Criminal 6		Status Review		Held as Scheduled
03/16/2006 09:00 AM	Criminal 6		Status Review		Rescheduled
05/25/2006 02:00 PM	Criminal 6		Status Review		Rescheduled
09/07/2006 02:00 PM	Criminal 6		Final Pre-Trial Conference		Canceled
09/28/2006 09:00 AM	Criminal 6		Jury Trial		Canceled
02/15/2007 02:00 PM	Criminal 6		Trial Assignment Conference		Rescheduled
11/06/2007 02:00 PM	Criminal 6		Trial Assignment Conference		Rescheduled
11/27/2007 02:00 PM	Criminal 6		Status Review		Held as Scheduled
01/22/2008 02:00 PM	Criminal 6		Status Review		Held as Scheduled
02/05/2008 02:00 PM	Criminal 6		Status Review		Held as Scheduled
02/07/2008 02:00 PM	Criminal 6		Final Pre-Trial Conference		Rescheduled
03/04/2008 09:00 AM	Criminal 6		Jury Trial		Rescheduled
07/07/2008 02:00 PM	Criminal 6		Status Review		Held as Scheduled
07/31/2008 09:00 AM	Criminal 6		Status Review		Held as Scheduled
09/25/2008 02:00 PM	Criminal 6		Status Review		Rescheduled
09/30/2008 02:00 PM	Criminal 6		Status Review		Canceled

Date	Session	Location	Type	Event Judge	Result
10/02/2008 03:00 PM	Criminal 6		Status Review		Held as Scheduled
10/14/2008 09:00 AM	Criminal 6		Hearing for Appearance / Appointment of Counsel		Held as Scheduled
10/20/2008 09:00 AM	Criminal 6		Jury Trial		Rescheduled
10/20/2008 02:00 PM	Criminal 6		Status Review		Held as Scheduled
11/04/2008 02:00 PM	Criminal 6		Final Pre-Trial Conference		Rescheduled
11/18/2008 09:00 AM	Criminal 6		Jury Trial		Rescheduled
11/20/2008 02:00 PM	Criminal 6		Trial Assignment Conference		Held as Scheduled
03/10/2009 02:00 PM	Criminal 6		Status Review		Held as Scheduled
04/09/2009 02:00 PM	Criminal 6		Status Review		Held as Scheduled
05/07/2009 02:00 PM	Criminal 6		Status Review		Rescheduled
06/02/2009 02:00 PM	Criminal 6		Status Review		Not Held
06/09/2009 02:00 PM	Criminal 6		Status Review		Held as Scheduled
07/21/2009 02:00 PM	Criminal 6		Status Review		Rescheduled
07/30/2009 02:00 PM	Criminal 6		Status Review		Rescheduled
08/04/2009 09:00 AM	Criminal 7		Final Pre-Trial Conference		Not Held
08/04/2009 02:00 PM	Criminal 6		Final Pre-Trial Conference		Held as Scheduled
09/10/2009 09:00 AM	Criminal 6		Jury Trial		Not Held
09/10/2009 09:00 AM	Criminal 7		Jury Trial		
09/11/2009 09:00 AM	Criminal 7		Jury Trial		Not Held
09/11/2009 09:00 AM	Criminal 6		Jury Trial		Not Held
09/14/2009 09:00 AM	Criminal 6		Jury Trial		Not Held
09/14/2009 09:00 AM	Criminal 7		Jury Trial		Not Held
09/15/2009 09:00 AM	Criminal 7		Jury Trial		Not Held
09/16/2009 09:00 AM	Criminal 7		Jury Trial		Not Held
09/17/2009 09:00 AM	Criminal 7		Jury Trial		Not Held
09/18/2009 09:00 AM	Criminal 7		Jury Trial		Not Held
09/21/2009 09:00 AM	Criminal 7		Jury Trial		Not Held
09/22/2009 09:00 AM	Criminal 7		Jury Trial		Not Held
09/23/2009 09:00 AM	Criminal 7		Jury Trial		Not Held

Date	Session	Location	Type	Event Judge	Result
09/24/2009 09:00 AM	Criminal 7		Jury Trial		Not Held
09/29/2009 09:00 AM	Criminal 7		Jury Trial		Not Held
09/30/2009 09:00 AM	Criminal 7		Jury Trial		Not Held
10/01/2009 09:00 AM	Criminal 7		Jury Trial		Not Held
10/02/2009 09:00 AM	Criminal 7		Jury Trial		Not Held
10/05/2009 09:00 AM	Criminal 7		Jury Trial		Not Held
10/06/2009 10:00 AM	Criminal 7		Hearing for Sentence Imposition		Held as Scheduled
12/12/2014 02:00 PM	Criminal 1		Status Review		Not Held
12/12/2014 02:00 PM	Criminal 4		Hearing		Held as Scheduled
02/06/2015 02:00 PM	Criminal 5		Hearing		Not Held
03/11/2015 02:00 PM	Criminal 5		Hearing		Held as Scheduled
07/01/2015 09:00 AM	Criminal 5		Hearing		Rescheduled
09/11/2015 09:00 AM	Criminal 1		Hearing		Held as Scheduled
09/17/2015 09:00 AM	Criminal 1		Hearing		Held as Scheduled
10/21/2015 09:00 AM	Criminal 1		Hearing		Held as Scheduled
02/18/2016 11:00 AM	Criminal 5	BOS-8th FL, CR 817 (SC)	Bail Hearing	Sanders, Hon. Janet L	Held as Scheduled
09/13/2016 02:00 PM	Criminal 6	BOS-9th FL, CR 906 (SC)	Conference to Review Status		Held as Scheduled
06/22/2017 02:00 PM	Criminal 6	BOS-9th FL, CR 906 (SC)	Conference to Review Status		

Docket Information

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
09/04/2002	Indictment returned	1	
09/04/2002	Motion by Commonwealth for arrest warrant to issue; filed & allowed. McEvoy, J.	2	
09/04/2002	Warrant on indictment issued		
09/04/2002	Warrant was entered onto the Warrant Management System September 04, 2002		
09/04/2002	Notice & copy of indictment & entry on docket sent to Sheriff		
09/04/2002	Notice & copy of indictment sent to Chief Justice & Atty General		
09/09/2002	Defendant brought into court. Warrant recalled		
09/09/2002	Appearance of Deft's Atty: Willie J Davis		
09/09/2002	Deft arraigned before Court. Indictment read as to offense #001.		
09/09/2002	RE Offense 1:Plea of not guilty		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
09/09/2002	Deft waives reading of indictment as to offense #002 thru 004.		
09/09/2002	RE Offense 2:Plea of not guilty		
09/09/2002	RE Offense 3:Plea of not guilty		
09/09/2002	RE Offense 4:Plea of not guilty		
09/09/2002	Mittimus without bail issued to Suffolk County Jail (Nashua Street). Wilson, AC/M - J. Wall, ADA - ERD - W. Davis, Attorney		
09/09/2002	Warrant canceled on the Warrant Management System September 09, 2002		
09/09/2002	Order of notice of finding of murder indictment	3	
09/09/2002	Commonwealth files notice of discovery.	4	
09/09/2002	Deft files motion for appointment of investigator	5	
09/09/2002	Motion (P#5) allowed		
09/09/2002	Deft files motion to hire expert.	6	
09/09/2002	Motion (P#6) allowed		
09/09/2002	Deft files motion for Order to permit inspection of physical evidence.	7	
09/17/2002	Deft files motion for exculpatory evidence	8	
09/17/2002	Deft files motion for documents, reports and statements	9	
09/17/2002	Deft files motion for disclosure of identification procedure	10	
09/17/2002	Deft files motion for statements of defendant	11	
09/17/2002	Deft files motion for statements of co-defendants	12	
09/17/2002	Deft files motion for copy of turret tape	13	
09/17/2002	Deft files motion to inspect grand jury exhibits	14	
09/17/2002	Deft files motion for promises, rewards or inducements	15	
09/17/2002	Deft files motion for "The Murder Book" or "File"	16	
09/17/2002	Deft files motion for photograph	17	
09/17/2002	Deft files motion for preservation of evidence	18	
09/17/2002	Deft files motion for criminal records of witnesses	19	
09/17/2002	Deft files motin for criminal record of co-defendants	20	
09/17/2002	Deft files motion for notice of prior acts of conviction	21	
09/17/2002	Deft files motion for disclosure of opinion evidence	22	
09/17/2002	Deft files motion for list of witnesses to be called at trial	23	
09/17/2002	Deft files motion for witnesses not to be called	24	
09/17/2002	Deft files motion for discovery of tests by the Commonwealth	25	
09/17/2002	Deft files motion for bill of particulars	26	
09/17/2002	Deft files motion for copy of police notes	27	
09/17/2002	Deft files motion for leave to file additional motion	28	
09/23/2002	Defendant not in Court. Pre-trial conference report filed	29	
09/23/2002	Deft files motion to hire fingerprint expert.	30	
09/23/2002	Motion (P#30) allowed (Gary D Wilson, Magistrate) - J. Wall, ADA - ERD - W. Davis, Attorney		
10/15/2002	Defendant not in court. Commonwealth files Motion for Discovery Protective Order. McEvoy, J. - J. Wall, ADA - N. McCann, Court Reporter - W. Davis, Attorney.	31	
10/23/2002	Defendant not in court. After hearing paper #31 allowed in part denied in part. See Protective Order.		
10/23/2002	Commonwealth files Discovery Protective Order.	32	
10/23/2002	Motion (P#32) allowed. Attorneys notified of order. McEvoy, J. - J. Wall, ADA - N. McCann, Court Reporter - G. Murphy, Attorney.		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
11/13/2002	Defendant not in Court. Commonwealth files notice of discovery II. Ford, AC/M - J. Wall, ADA - ERD - W. Davis, Attorney	33	
12/16/2002	Deft files motion to be admitted to bail	34	
12/19/2002	Defendant brought into court.		
12/19/2002	Court revokes all prior orders of bail.		
12/19/2002	After hearing, Motion (P#34) allowed.		
12/19/2002	Bail set: \$5,000,000.00 With Surety or \$500,000.00 Cash Bail. Bail Warning Read. Mittimus Issued. Hines, J. - J. Wall, ADA - P. Connolly, Court Reporter - W. Davis, Attorney.		
01/15/2003	Defendant not present. Wilson, AC/M - J. Wall, ADA - ERD - W. Davis, Attorney		
02/25/2003	Defendant not present. Wilson, AC/M- J. Wall, ADA - ERD - W. Davis, Attorney.		
03/14/2003	Defendant not present. Wilson, Mag - J. Wall, ADA - W. Davis, Atty ERD		
03/19/2003	Deft files motion for copies of search warrants and affidavits	35	
03/19/2003	Deft files motion fo rder to permit inspection of physical evidence	36	
03/19/2003	Deft files motion for order to permit inspection of fingerprint evidence	37	
04/17/2003	Defendant not present.		
04/17/2003	Paper #16 endorsed see motion.		
04/17/2003	Motion (P#24) allowed as agreed to percipient witnesses only.		
04/17/2003	Motion for copy of police notes endorsed - see motion.		
04/17/2003	Order to provide copies of search warrants, filed.	38	
04/17/2003	Order to permit inspection of fingerprint material, filed.	39	
04/17/2003	Order to permit inspection of ballistics evidence, filed. Quinlan, J. - J. Wall, ADA - A. McDonald, Court Reporter - W. Davis, Attorney.	40	
05/19/2003	Defendant came into court		
05/19/2003	Deft files motion for funds for photographs. Wilson, Mag - ERD - W. Davis, Attorney	41	
06/27/2003	Defendant not present.		
06/27/2003	Deft files motion to continue	42	
06/27/2003	Motion (P#42) allowed. Wilson, Mag. - C. Bartoloni, for J. Wall, AD A - E.R.D.		
07/15/2003	Commonwealth files notice of discovery III	43	
07/18/2003	Deft files motion for continuance	44	
07/28/2003	Defendant not present. Ford, Mag- G.Brooks for J.Wall, ADA- ERD		
08/18/2003	Defendant's motion to suppress and affidavit, filed.	45	
09/08/2003	Case specially assigned to Donovan, J. for all purposes in the 4th Criminal Session Rm 10. Continued to 10/10/03 for motions and trial assignement per order of Spurlock, RAJ.		
09/12/2003	CASE RECEIVED 4TH CRIM. SESSION.		
10/09/2003	Defendant not in Court. Lobby conference before Donovan, J.		
10/09/2003	Deft files Motion for Continuance	46	
10/09/2003	Motion (P#46) allowed. After lobby conference, case scheduled for 10/29/03 for hearing re: Motion to Suppress Statement and selection of trial date. Donovan, J. - J. Wall, ADA		
10/29/2003	Defendant not in Court. Donovan, J. - J. Wall, ADA - A. McDonald, Court Reporter - W. Davis, Attorney		
12/22/2003	Defendant not present..		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
12/22/2003	Deft files motion to continue.	47	
12/22/2003	Motion (P#47) allowed (Donovan, J.).		
12/22/2003	Continued until January 05, 2004 re: motion to suppress. The court orders no further continuances. Donovan, J - J Wall, ADA - W Davis, Attorney		
01/05/2004	Defendant brought into court. Hearing re: motion to suppress (P#45). After hearing, Paper #45 is taken under advisement. Continued to 2/3/04 for status hearing by agreement. Brady, J - J Wall, ADA - N McCann, Court Reporter - W Davis, Attorney		
01/09/2004	Deft files memorandum in support of motion to suppress.	48	
01/09/2004	Commonwealth files memorandum in opposition to defendant's motion to suppress.	49	
01/15/2004	Finding by Court: memorandum of decision denying defendant's motion to suppress filed. Brady, J. (J Wall, ADA and W Davis, Attorney notified 1/15/04 w/copy)	50	
02/03/2004	Defendant brought into court. Hearing Re: trial date after hearing, case is continued for trial the week of 4/5/04 by agreement. Brady, J - J. Wall, ADA - W. Davis, Atty - N. McCann, CR		
02/13/2004	Deft files Exparte motion for additional funds for investigation.	51	
02/13/2004	Deft files Exparte motion for summons.	52	
02/13/2004	Deft files Exparte motion for summons II	53	
02/13/2004	Deft files Motion for further discovery.	54	
02/26/2004	Defendant not present. Hearing re: motion.		
02/26/2004	Motion (P#51) allowed (Patrick F. Brady).		
02/26/2004	Motion (P#54) allowed (Patrick F. Brady).		
02/26/2004	Motion (P#53) allowed (Patrick F. Brady).		
02/26/2004	Motion (P#52) allowed (Patrick F. Brady). J. Wall, ADA - W. Davis, Atty - D. Cercone, CR		
02/27/2004	Summons issued to the Keepers of the Records for Boston Police Department and MBTA Police Police Department.		
03/08/2004	Deft files Response to bill of particulars is filed.	55	
03/08/2004	Commonwealth files Bill of Particulars.	56	
03/10/2004	Deft files Motion for severance.	57	
03/10/2004	Deft files Request for hearing.	58	
03/16/2004	Order of Brady, J. Re: Production of Criminal Records is filed.	59	
03/18/2004	Defendant not present. Brady, J - J. Wall, ADA		
03/19/2004	Deft files Motion to interview witness.	60	
04/02/2004	Deft files motion for summons III.	61	
04/05/2004	Defendant not present. Hearing re: motions. After hearing, motion to sever (P#57) is taken under advisement.		
04/05/2004	Motion (P#61) allowed.		
04/05/2004	Continued until April 20, 2004 for status by order of the Court. Brady, J - J Wall, ADA - N McCann, Court Reporter - W Davis, Attorney		
04/07/2004	Motion (P#57) denied as endorsed. (Patrick F Brady). Copies mailed 4/7/04		
04/07/2004	Motion (P#60) allowed as endorsed. (Patrick F Brady). Copies mailed April 07, 2004		
04/13/2004	Summons issued to the Keeper of the records, Somerville Police Department, Somerville, MA		
04/13/2004	Deft files Notice of appeal (severance)	62	
04/13/2004	Deft files Motion for reconsideration of bail.	63	

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
04/13/2004	Deft files Motion for speedy trial.	64	
05/17/2004	General correspondence regarding notice of docket entry received from the SJC - Order: It is ordered that the Commonwealth file its response on or before Friday, May 28, 2004. Spina, J.	65	
05/19/2004	Summons re-issued to the Keeper of the Records, Somerville Police Department (Hand delivered)		
06/01/2004	Summons returned with service re: Somerville Police Dept.		
06/14/2004	Notice of assembly of the record	66	
09/01/2004	Deft files motion for show cause hearing	67	
09/01/2004	Deft files motion for additional funds for investigator	68	
09/10/2004	Defendant not present in court, continued until November 15, 2004 for trial by agreement. Atty. Davis to contact Somerville P.D. re: Summons issued on 05/19/04. If Somerville P.D. does not respond by 09/17/04 a Show cause hearing will be scheduled. Rouse, J. - J. Wall, ADA - W. Davis, Atty.		
09/16/2004	Deft files Motion to grant appropriate releif	69	
09/16/2004	Deft files Motion for process to issue for out of state witness	70	
09/16/2004	Deft files Ex-Parte Application for summons II	71	
09/16/2004	Deft files Ex-Parte Application for summons for witness	72	
10/27/2004	Deft files Motion for leave to join	73	
11/01/2004	Summons issued to The Keeper of the Records; Asthar Car & Limo Service, Roxbury, Lakeisha Rivers, Tonisha Rivers, Adryene Furr, Mabel Maddrey, Demetrius L. Williams, Stephanie Williams, Kareem Fountain, Eddie Mack, Terrell Hart, Tyrone Brown, Kollie Peuw - Inner City Horizons and Juan Baez - Asthar Car & Limo Service. Witnesses to appear November 17, 2004.		
11/01/2004	Defendant brought into court - Hearing Paper #69 - Affidavit of J. Wall, ADA filed and attached to Paper #69.		
11/01/2004	Motion (P#69) denied as endorsed.		
11/01/2004	Motion (P#71) allowed		
11/01/2004	Motion (P#72) allowed.		
11/01/2004	Motion (P#73) allowed. Summons to issue. Hinkle, J. - J. Wall, ADA - D. Cercone, Court Reporter - J. Budreau, Attorney.		
11/02/2004	Deft files motion for discovery of tape recorded conversation	74	
11/02/2004	Deft files motion for discovery concerning gang affiliation	75	
11/02/2004	Deft files motion for additional funds for investigator	76	
11/02/2004	Commonwealth files Commonwealth's opposition to defendant Nelsons motion in limine to exclude post arrest statement of defendant Cousins and motion for severance	77	
11/02/2004	Commonwealth files opposition to defendant's motion to suppress statements for Sixth Amendment Violation	78	
11/02/2004	Commonwealth files notice of Discovery V re: defendant's motions	79	
11/02/2004	Deft files motion in limine	80	
11/02/2004	Deft files second motion in limine	81	
11/02/2004	Deft files third motion in limine	82	
11/02/2004	Deft files fourth motion in limine	83	
11/02/2004	Deft files fifth motion in limine	84	
11/02/2004	Deft files sixth motion in limine	85	
11/02/2004	Deft files motion for voir dire on admissibility of statements of defendant	86	
11/02/2004	Deft files motion for voir dire on testimony of witnesses	87	
11/02/2004	Deft files motion to exclude evidence	88	

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
11/02/2004	Deft files motion for sequestration of witnesses	89	
11/02/2004	Deft files motion for exemption from order of sequestration	90	
11/02/2004	Deft files motion for individual voir dire of prospective jurors	91	
11/02/2004	Deft files request for voir dire of prospective jurors (statutory)	92	
11/02/2004	Deft files request for voir dire of prospective jurors (discretionary)	93	
11/02/2004	Deft files request for voir dire of prospective jurors regarding publicity	94	
11/02/2004	Deft files request for voir dire of prospective jurors regarding specific bias	95	
11/02/2004	Deft files request for pre-trial instructions to the jury	96	
11/02/2004	Deft files motion to permit jurors to take notes	97	
11/03/2004	Out of State Witness Summons and Papers processed and given to Willie Davis		
11/10/2004	Deft files Motion for Interpreter	98	
11/10/2004	Deft files Potential Witnesses for the Defense	99	
11/10/2004	Commonwealth files Motion in Limine for individual voir dire of jurors.	100	
11/10/2004	Commonwealth files Opposition to Defendant's Motion to lift protective order	101	
11/10/2004	Commonwealth files Motion in Limine to Exclude Prior Bad Acts	102	
11/10/2004	Commonwealth files Motion in Limine regarding photographs of victim.	103	
11/10/2004	Commonwealth files Opposition to defendant's motion to exclude expert testimony about gang affiliation	104	
11/10/2004	Commonwealth files Opposition to defendant's motion to exclude testimony about police observation of Marquis Nelson	105	
11/10/2004	Deft files Notice of Alibi	105.1	
11/10/2004	Defendant brought into Court, hearing re: motions.		
11/10/2004	Motion (P#80) denied as endorsed.		
11/10/2004	Paper #81 reserved at this time as endorsed.		
11/10/2004	Paper #82 ruled moot (see endorsement)		
11/10/2004	Paper #83 reserved (see endorsement)		
11/10/2004	Paper #84 reserved (see endorsement)		
11/10/2004	Paper #85 reserved (see endorsement)		
11/10/2004	Motion (P#98) allowed.		
11/10/2004	Paper #74 ruled moot.		
11/10/2004	Motion (P#89) allowed		
11/10/2004	Motion (P#90) allowed		
11/10/2004	Motion (P#76) allowed		
11/10/2004	Motion (P#98) allowed. Hinkle,J-J.Wall, ADA-D.Cercone, Court Reporter-W.Davis, Attorney.		
11/15/2004	Commonwealth files Motion for view	106	
11/15/2004	Commonwealth files opposition to motion in limine	107	
11/15/2004	Defendant brought into Court.		
11/15/2004	Commonwealth's amended motion in limine for individual voir dire filed in SUCR2002-10866; allowed as indicated on the record.		
11/15/2004	Motion (P#86) allowed as indicated.		
11/15/2004	Motion (P#91) allowed.		
11/15/2004	Paper #100 withdrawn.		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
11/15/2004	Motion (P#92) allowed as indicated on the record.		
11/15/2004	Motion (P#89) allowed		
11/15/2004	Motion (P#90) allowed		
11/15/2004	Motion (P#93) allowed as indicated on the record.		
11/15/2004	Motion (P#97) allowed		
11/15/2004	Motion (P#94) allowed as indicated on the record.		
11/15/2004	Motion (P#95) allowed as indicated on the record.		
11/15/2004	Motion (P#103) reserved.		
11/15/2004	Motion (P#102) allowed as endorsed.		
11/15/2004	After hearing re: voir dire of witness, witness allowed to testify.		
11/15/2004	Motion (P#106) allowed		
11/15/2004	Paper #81 ruled moot (See endorsement)		
11/15/2004	Paper #88 reserved.		
11/15/2004	Commonwealth files Comprehensive Notice of Discovery IV (Paper #76 in 02-10866)		
11/16/2004	Defendant brought into Court.		
11/16/2004	Commonwealth moves for trial. Court, Hinkle, J orders a jury of sixteen members impanelled. Jury impanelment not complete, continued to 11/17/04 for further impanelment. Hinkle, J- J.Wall, ADA-D.Cercone, Court Reporter-W.Davis, Attorney.		
11/17/2004	Defendant brought into Court.		
11/17/2004	Jury impanelment continues, jury impanelment not completed. Continued to 11/18/2004 for further impanelment. D.Cercone, Court Reporter.		
11/18/2004	Defendant brought into Court.		
11/18/2004	Jury impanelment continues, jury of sixteen members impanelled not sworn. Continued to 11/19/2004. D. Cercone, Court Reporter.		
11/19/2004	Defendant brought into Court.		
11/19/2004	Deft files Motion to redact written plea agreement.	107.1	
11/19/2004	Trial commences before Hinkle, J and a jury of sixteen members. D. Cercone, Court Reporter		
11/23/2004	Defendant brought into Court.		
11/23/2004	Jury on a view. Trial continues before Hinkle, J and panel of sixteen jurors. D. Cercone, Court Reporter		
11/29/2004	Defendant brought into Court.		
11/29/2004	Commonwealth files Motion in Limine concerning Cross-Examination of Commonwealth's witnesses.	108	
11/29/2004	Voir dire hearing conducted re: witness Sgt. Det. Robert Merner. After hearing, extent of testimony permitted is taken under advisement. See record.		
11/29/2004	Trial resumes before Hinkle, J and panel of sixteen jurors. D.Cercone, Court Reporter.		
11/30/2004	Defendant brought into Court.		
11/30/2004	Deft files Second motion for limiting instruction.	108.1	
11/30/2004	Trial continues. D. Cercone, Court Reporter		
12/01/2004	Defendant brought into Court.		
12/01/2004	Deft files Third motion for limiting instruction.	109	
12/01/2004	Deft files Motion to exclude tape and transcript of statement	109.1	
12/01/2004	Trial continues. D.Cercone, Court Reporter		
12/02/2004	Defendant brought into Court.		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
12/02/2004	Deft files Fourth motion for limiting instruction.	110	
12/02/2004	Deft files Motion to exclude evidence of similar weapon.	111	
12/02/2004	Motion (P#111) denied after hearing.		
12/02/2004	Trial continues. D. Cercone, Court Reporter		
12/03/2004	Defendant brought into Court.		
12/03/2004	Motion (P#109.1) allowed as endorsed after hearing.		
12/03/2004	Trial continues. D. Cercone, Court Reporter		
12/06/2004	Defendant brought into Court.		
12/06/2004	Deft files Sixth motion for limiting instruction.	112	
12/06/2004	Trial continues before Hinkle,J and panel of sixteen jurors.		
12/06/2004	After hearing, juror seated in Seat 12 (13-6) excused from further service on this trial. D. Cercone, Court Reporter		
12/07/2004	Defendant brought into Court.		
12/07/2004	Trial continues before Hinkle,J and jury of fifteen members. D. Cercone, Court Reporter		
12/08/2004	Defendant brought into Court.		
12/08/2004	Deft files Instructions to the Jury.	113	
12/08/2004	Commonwealth files Jury Instructions (Paper #s 82085 in SUCR02-10866)		
12/08/2004	Trial continues. D.Cercone, Court Reporter		
12/09/2004	Defendant brought into Court.		
12/09/2004	Trial continues, Commonwealth rests. At the close of the Commonwealth's case in chief,		
12/09/2004	Deft files Motion for required finding of not guilty as to Offense #001	114	
12/09/2004	Deft files Motion for required finding of not guilty as to Offense #002	115	
12/09/2004	Deft files Motion for required finding of not guilty as to Offense #003	116	
12/09/2004	Deft files Motion for required finding of not guilty as to offense #004	117	
12/09/2004	Motions #114, 115, 117 each denied after hearing; ruling reserved at this time as to Offense #003. F. LaRoux, Court Reporter		
12/10/2004	Defendant brought into Court.		
12/10/2004	Trial continues before Hinkle,J and jury of fifteen members. Defendant rests, co-defendant Nelson rests. Commonwealth's rebuttal testimony completed.		
12/10/2004	After hearing defendant joins co-defendant in motion for required finding as to each offense.		
12/10/2004	Motion (P#116) denied after hearing as to Offense #003; joint motions for required finding are each denied.		
12/10/2004	Jury allowed to separate and return on Monday for arguments and charge. Hinkle,J-J.Wall, ADA-D.Cercone, Court Reporter- W.Davis, Attorney.		
12/13/2004	Defendant brought into Court.		
12/13/2004	At the final submission of the case to the jury, there remaining fifteen jurors, the Court orders that the jury be reduced to twelve in number. The jurors seated in Seats #8 (01-14), #4 (09-15) and #3 (9-04) were each drawn and designated as alternate jurors to be kept separate and apart. Jury commences deliberations. D.Cercone, Court Reporter.		
12/14/2004	Defendant brought into Court.		
12/14/2004	Jury deliberations continue. D.Cercone, Court Reporter		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
12/14/2004	Deft files Memorandum of defendant on request for alibi instruction	118	
12/14/2004	Deft files Second motion for additional funds	119	
12/15/2004	Defendant brought into Court.		
12/15/2004	Motion (P#119) allowed. D.Cercone, Court Reporter		
12/15/2004	Jury deliberations continue. D. Cercone, Court Reporter		
12/16/2004	Defendant brought into Court.		
12/16/2004	Jury deliberation continues. Court orders Items for Identification marked III and JJJ and impounded. D. Cercone, Court Reporter		
12/17/2004	Defendant brought into Court.		
12/17/2004	Jury deliberation continues. Juror seated in Seat #9 (11-05) excused from further service. Court appoints Juror seated in Seat #5 (10-05) as the new foreperson of the jury. M. Wrighton, Court Reporter.		
12/20/2004	Defendant brought into Court.		
12/20/2004	Juror 9-15 was selected by lottery and seated as a deliberating juror. Jury sent to re-commence deliberations. Jurors excused at 4:35p.m. and ordered to report at 8:45a.m. on 12/21/2004 to resume deliberations. D. Cercone, Court Reporter		
12/21/2004	Defendant brought into Court.		
12/21/2004	Jury deliberations continue. D. Cercone, Court Reporter		
12/22/2004	Defendant brought into Court.		
12/22/2004	Jury deliberations continue. After lobby conference, Court excuses Juror #08-05, seated in seat #2, Juror #12-08, seated in seat #10, and Juror #13-9, seated in Seat #13 from further service in this trial. Court declares Mistrial, the remaining jurors were released from further service. Hinkle,J-J.Wall, ADA-D. Cercone, Court Reporter-W.Davis, Attorney.		
12/23/2004	Deft files Motion for reduction of bail.	120	
12/23/2004	Deft files Motion for transcript.	121	
12/23/2004	Deft files Motion for copy of testimony of Landrum and McAfee	122	
12/23/2004	Deft files Motion for copy of note from First Foreperson	123	
12/28/2004	ORDERED: Court orders items marked for Identification EEEE, GGGG, HHHH through MMMM each impounded. Hinkle,J.		
12/29/2004	Deft files Motion for transcript of trial	124	
12/29/2004	Defendant not in Court. Hearing re: Motions.		
12/29/2004	Motion (P#122) allowed as endorsed after hearing. Transcript of Landrum & McAfee provided, Copies of Identification exhibits III and JJJ provided.		
12/29/2004	Motion (P#124) denied as endorsed after hearing.		
12/29/2004	Motion (P#121) allowed as endorsed.		
12/29/2004	Motion (P#123) allowed after hearing as endorsed.		
12/29/2004	Motion (P#120) denied as endorsed.		
12/29/2004	Continued to 01/25/05 for status hearing. Hinkle,J-J.Wall, ADA-D.Cercone, Court Reporter-W.Davis, Attorney.		
01/05/2005	Deft files Motion for criminal history of jurors	125	
01/05/2005	Deft files Motion for copies of juror questionnaires	126	
01/05/2005	Deft files Renewed motion for a transcrip and motion for funds for a transcript, and memorandum in support thereof.	127	
01/14/2005	Motion of the Globe Newspaper Company, Inc. for expedited transcript of in camera hearings, filed.	128	
01/18/2005	Court schedules hearing for 1/21/05 if counsel for the defendant and Commonwealth are available. Hinkle,J.		
01/19/2005	Commonwealth files Request for copies of juror questionnaires	129	

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
01/21/2005	Defendant not in Court.		
01/21/2005	Hearing on (P#128) held, matter taken under advisement (see record)		
01/21/2005	Motion (P#125) after hearing allowed in part as to the three jurors who were excused, see record and endorsement; denied in part as to the other two jurors, see record and endorsement.		
01/21/2005	Motion (P#126) allowed after hearing.		
01/21/2005	Motion (P#129) allowed after hearing as endorsed.		
01/21/2005	Continued to 3/11/2005 for hearing at 2:00 p.m. by agreement re" status. 1/25/05 date is cancelled. Defendant is to file supporting memorandum by 2/8/05, Commonwealth to file response by 2/22/05. Hinkle, RAJ-J.Wall and J. Zanini, ADAs-D.Cercone, Court Reporter-W.Davis and B.Keehn, Attorneys for Defendant- N. McGaraghan, Attorney for the Boston Globe, J. Cavanaugh representing the Jury Commissioner.		
01/25/2005	Supplemental memorandum of law of Globe Newspaper Company, Inc. in Support of Motion for Expedited Transcript of In Camera Hearings, filed.	130	
01/25/2005	Declaration of Neil McGaraghan filed.	131	
01/26/2005	Commonwealth files motion in re: Globe Newspaper Company, INC'S motion for expedited transcript of in camera hearings.	132	
02/08/2005	Deft files Motion to Dismiss.	133	
02/09/2005	Court, Hinkle, RAJ endorses motion to dismiss as follows: " Under the Uniform Rules of Impoundment Procedure, this motion is impounded absent further order of the court. I find that impoundment is warranted to protect privacy interests of the jurors in question - The confidentiality of the jury deliberations, sidebars and the integrity of the judicial process. This, in my view outways the interest of the media & the public (at least at this time) in having access to this information. Hinkle,RAJ."		
02/11/2005	Memorandum of Decision and Order Allowing in Part and Denying in Part Motion of the Globe Newspaper Company Inc. for Expedited Transcript of In Camera Hearing of 12/22/04, filed. Hinkle, RAJ (All counsel notified with copy)	134	
02/11/2005	Motion (P#128) allowed in part.		
02/11/2005	Motion (P#128) denied in part. Hinkle, J. (Parties notified.)		
02/18/2005	Commonwealth files Motion to Enlarge Time to File Opposition to Defendant's Motion to Dismiss.	135	
03/02/2005	Commonwealth files Commonwealth's Memorandum in Opposition to Defendant's Motion to Dismiss.	136	
03/09/2005	Deft files waiver of presence.	137	
03/09/2005	Motion (P#137) allowed, the Commonwealth not objecting.		
03/11/2005	Defendant not present- Hearing re: paper #133. (Motion to dismiss) after hearing, taken under advisement. Defendant to respond by 3/16/05. Hinkle, RAJ - J. Zanini & J. Wall, ADA - D. Cercone, Court Reporter - W. Davis & B. Keahn, Attorneys		
03/22/2005	Commonwealth files Response to Defendant's Letter of March 18, 2005.	137.1	
04/11/2005	Finding by Court: memorandum of desicion and order denying defendants motion to dismiss indictment on double jeopardy grounds filed. Hinkle J.	138	
04/11/2005	Motion (P#133) denied (Margaret R. Hinkle).		
05/03/2005	Defendant not present in court, status conference held. Continued until July 26, 2005 at 2:00 PM re: status re: Appellate Court ruling. Hinkle, RAJ - J. Wall, ADA - P. Flaherty, Court Reporter - W. Davis, Attorney		
05/24/2005	Deft files Motion to Correct -	139	
05/24/2005	Deft files Motion for a transcript of proceedings of 12/21/04.	140	
05/25/2005	Motion (P#139) denied as endorsed.		

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05/25/2005	Motion (P#140) allowed. Hinkle, RAJ (Counsel notified w/ copy)		
06/15/2005	Deft files Notice of Appeal to Denial of Motion to Correct the "Memorandum of Decision and Order on Defendant's Motion to Dismiss.	141	
07/26/2005	Defendant not present - Status conference held. Continue for further status re: Appellate Ruling by agreement.		
07/26/2005	Defendant's oral motion to copy Identification ZZZ made and allowed. Hinkle, RAJ - J. Wall, ADA - R. LeRoux, Court Reporter - W. Davis, Attorney for defendant.		
10/27/2005	Defendant not present. Oral motion to continue allowed. Continued to 1/10/2006 re: Status by agreement. Rule 36 waived. Margaret R Hinkle, Regional Admin. Justice - D. Meier for J. Wall. ADA - W. Davis, Attorney - M. Malley, Court Reporter.		
01/11/2006	Defendant not in court.		
01/11/2006	After hearing case continued by agreement to March 16, 2006 for status and September 28, 2006 for trial. Hinkle, J - W. Davis Attorney - J. Wall ADA - D. Cercone Court Reporter		
01/12/2006	Notice received from SJC re: Stay of retrial pending appeal is allowed.		
03/21/2006	Defendant not in Court. Status conference not held. Attorney Davis on Trial before Brady, J. this day.		
03/21/2006	Continued to 5/25/06 at 2:00 p.m. by agreement for status. Attorney Davis notified. Hinkle, RAJ - P. Haggan, ADA - D. Cercone, CR.		
05/24/2006	Letter received from Attorney David re: SJC Appeal status requesting a status date in Superior Court re: rescheduling status date.		
08/11/2006	Deft files Motion for Continuance	142	
09/06/2006	Motion (P#142) allowed -		
01/29/2007	Date of 02/15/2007 cancelled and to be rescheduled by order of Court. Hinkle, RAJ (Counsel notified via mail)		
11/06/2007	Defendant not present, Attorney Davis not available. Case continued until 11/27/2007 by agreement re: trial assignment. Hinkle, RAJ - J. Wall, ADA - R. LeRoux, Court Reporter		
11/21/2007	Notice received from the SJC - Judgement after Rescript, filed.		
11/27/2007	Defendant not present - status conference held.		
11/27/2007	Deft files Motion for Additional Funds for Investigation	143	
11/27/2007	MOTION (P#143) allowed, after hearing.		
11/27/2007	Deft files Motion for Transcript of Testimony of Defense Witnesses	144	
11/27/2007	MOTION (P#144) allowed as long as transcripts are completed before 03/04/2008; the trial date. (W. Davis, Attorney and D. Cercone, CR notified w/copy of endorsement)		
11/27/2007	Continued to 2/7/2008 for FPTC by agreement and 03/04/2008 for trial by agreement (2 wks) (Jail List) Hinkle, RAJ - J. Wall, ADA - R. LeRoux, Court Reporter - W. Davis, Attorney		
01/15/2008	Defendant not present, case continued by agreement until 1/22/2008 for conference re: trial assignment (potential time conflict of W. Davis) Hinkle, RAJ - I. Polumbaum for J. Wall, ADA - E. Blake, Court Reporter - W. Davis, Attorney		
01/22/2008	Defendant not present - status conference held before Hinkle, RAJ.		
01/22/2008	After hearing the Court orders the trial date of 03/04/2008 cancelled at this time. New trial date to be scheduled.		
01/22/2008	Continued by agreement to 2/5/2008 for status and hearing re: motion to continue. Hinkle, RAJ - P. Treseler for J. Wall, ADAs - E. Blake, Court Reporter - W. Davis, Attorney		
01/23/2008	Deft files Motion to Continue Hearing and to Set New Trial Date	145	
01/23/2008	MOTION (P#145) allowed as endorsed. (Margaret R. Hinkle, Justice).		

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02/05/2008	Defendant not present, conference held. After conference, case continued until 10/20/2008 for trial by agreement and for the FPTC on 09/30/2008 by agreement. Hinkle, RAJ - J. Wall, ADA - R. LeRoux, Court Reporter - W. Davis, Attorney		
07/07/2008	Defendant not in Court. Status conference held.		
07/07/2008	Continued until 07/31/2008 by agreement at 9 A.M. re: further status conference. Hinkle, R.A.J. - J. Wall, ADA- F. LeRoux, C.R. - W. Davis, Attorney.		
07/29/2008	Deft files Status Report	146	
07/31/2008	Defendant not present		
07/31/2008	Defendant files MOTION to continue trial date	147	
07/31/2008	MOTION (P#147) allowed after hearing with the Commonwealth not objecting. Hinkle, RAJ		
07/31/2008	Tracking deadlines Extended by Discovery		
07/31/2008	Trial date of 10/20/2008 cancelled and rescheduled to 11/18/2008 by agreement. Final pre trial conference date of 09/30/2008 - rescheduled for status hearing. Final pre trial conference scheduled for 11/04/2008 by agreement. Hinkle, RAJ - J. Wall, ADA - M. Wrighton, Court Reporter - W. Davis, Attorney		
08/28/2008	Deft files Final Status Report Submitted by Defendant	148	
09/18/2008	Scheduled on 09/25/2008 re: admin. review of trial date.		
09/25/2008	Defense counsel unavailable (see record). Continued to 10/2/2008 re: status at 3:00 PM. Hinkle, RAJ - J. Wall, ADA - A. O'Brien, Court Reporter - W. Davis, Attorney (via conference telephone call)		
10/02/2008	Defendant not present, status conference held. Attorney Davis reports that defendant informed him that he would prefer new counsel. Case continued until 10/14/2008 at 9:00 AM re: counsel (Jail List) Hinkle, RAJ - J. Wall, ADA - A. O'Brien, Court Reporter - W. Davis, Attorney		
10/03/2008	Attorney, Willie J Davis's MOTION to withdraw as counsel of record for Joseph Cousin, filed.	149	
10/14/2008	Defendant brought into court - hearing re: paper #149.		
10/14/2008	MOTION (P#149) after hearing, the defendant being present, this motion is allowed for the reasons set forth on the record, which show that irreconcilable differences between counsel and client have developed. Attorney Davis allowed to withdraw upon appearance of successor counsel.		
10/14/2008	Continued to 10/20/08 at 2:00PM re: new counsel. CPCS notified. (Jail list) Hinkle, RAJ - J. Wall, ADA - W. Davis, Attorney - F. LeRoux, Court Reporter		
10/20/2008	Defendant present, brought into court. Hearing re: counsel held.		
10/20/2008	Continued to 11/20/2008 for trial assignment. Rule 36 waived. Hinkle, RAJ - J. Wall, ADA - E. Tyler, Court Reporter - W. White, Attorney		
10/20/2008	Tracking deadlines Extended due to New Counsel		
10/22/2008	Appearance of Deft's Atty: William M White Jr entered		
11/20/2008	Defendant not present, case continued until 3/10/2009 by agreement re: status, 08/04/2009 for FPTC and 09/10/2009 for trial. Hinkle, RAJ - J. Wall, ADA - E. Blake, Court Reporter - W. White, Attorney		
03/10/2009	Defendant not present, hearing held re: deft's renewed motion for transcript (P#127)		
03/10/2009	MOTION (P#127) allowed after hearing as endorsed.		
03/10/2009	Continued by agreement to 4/9/2009 for status. Gaziano, RAJ - A. Galatis, ADA for J. Wall, ADA - R. LeRoux, Court Reporter - W. White, Attorney		
04/09/2009	Defendant not present, status conference held. Deft to review exhibits that are in custody of the Commonwealth. Case continued until 5/7/2009 for further status, 08/04/2009 for FPTC and 09/10/2009 for trial. Gaziano, J - C. Flashner, ADA - R. LeRoux, Court Reporter - W. White, Attorney		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
05/07/2009	Defendant not present, ADA unavailable. Case continued until 6/2/2009 by agreement for status re: discovery. Gaziano, RAJ - W. White, Attorney (Notice sen to J. Wall, ADA)		
06/02/2009	Defendant not in court. Session unavailable due to trial.		
06/02/2009	Continued to 6/9/09 by agreement for Status Conference re: Discovery. Gaziano, RAJ - J. Wall, ADA - W. White, Atty (Both by phone)		
06/09/2009	Defendant not present, status conference held before Gaziano, RAJ. Case continued until 7/21/2009 by agreement for status re: transcripts. Gaziano, RAJ - J. Wall, ADA - R. LeRoux, Court Reporter - W. White, Attorney		
07/21/2009	Defendant not present, ADA Wall unavailable this day. Case continued until 7/30/2009 by agreement for status. Gaziano, RAJ - M. Wrighton, Court Reporter - W. White, Attorney (Notice sent to J. Wall, ADA)		
08/04/2009	Defendant not present - FPTC held.		
08/04/2009	Filed: Joint Pre-Trial Memorandum	150	
08/04/2009	Commonwealth files Motion for Writ of Habeas Corpus ad Testificandum	151	
08/04/2009	MOTION (P#151) allowed.		
08/04/2009	Commonwealth files List of Potential Witness I Provided to Defense Counsel.	152	
08/04/2009	Deft files List of Potential Witness II for Jury Selection	153	
08/04/2009	Deft files Ex Parte Motion for Criminal Records of Witnesses	154	
08/04/2009	MOTION (P#154) allowed		
08/04/2009	ORDER of the Court, Gaziano, RAJ, filed. (CORI)	155	
08/04/2009	Case held in Session- Ready for trial on 09/10/2009 by agreement. (Jail List) Gaziano, RAJ - P. Haggan for J. Wall, ADA - N. King, Court Reporter - W. White, Attorney		
08/04/2009	Request for Jurors to impanel		
08/06/2009	Case transferred to Seventh Criminal Session for trial.		
08/26/2009	Commonwealth files request for an out of state witness.	156	
08/31/2009	MOTION (P#156) allowed (Frank M Gaziano, Regional Administrative Justice). (process issued 8/31/09)		
09/08/2009	Deft files ex-parte application for summons for witnesses	157	
09/08/2009	Deft files request for Brady/Kyles exculpatory material	158	
09/08/2009	Order issued for criminal records, Gaziano, J.	159	
09/10/2009	Case held in Session- Ready for trial		
09/10/2009	Deft files list of potential witnesses	160	
09/10/2009	Commonwealth files request for individual jury questions	161	
09/10/2009	Commonwealth files motion in limine for evidence concerning gang affiliation , motive and joint venture	162	
09/11/2009	Defendant brought into court .		
09/11/2009	Commonwealth files witness list. The Court orders inpanelment of sixteen (16) jurors, proces begins. Continued to 9/14/09 for continued jury inpanelment. Holtz, J. - J. Wall, ADA - P. Connolly, CR - B. White, ATTY	163	
09/14/2009	Defendant brought into court . Inpanelmenr process continues before Holtz, J. - Holtz, J. - J. Wall, ADA - P. Connolly, CR - B. White, ATTY		
09/15/2009	Defendant brought into court . Hearing re; juror # 18 in seat # 14 Khalila excused from further juror service due to hardship. Hearing rear juror in seat # 2 Susan Davis was challenged by the Commonwealth (see ID-A) after hearing excused from further service. Jurors sworn, indictments read, trial on offenses #001 thru #004 with sixteen (16) jurors present. Holtz, J. - J.Wall , ADA - J. Connolly, CR - B. White, ATTY		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
09/16/2009	Defendant brought into court. Trial continues before Holtz, J. with sixteen (16) jurors present. Holtz, J. - J. Wall, ADA - P. Connolly, CR - B. White, ATTY		
09/17/2009	Defendant brought into court. Trial continues before Holtz, J. with sixteen (16) jurors present.		
09/17/2009	Deft files ex-parte motion for additional funds for an investigator	164	
09/17/2009	MOTION (P#164) allowed (Nancy Holtz, Justice). - J. Wall, ADA - P. Connolly - B. White. ATTY		
09/18/2009	Defendant brought into court .		
09/18/2009	Deft files ex-parte motion for funds for witness travel expenses	165	
09/18/2009	MOTION (P#165) allowed as endorsed. (Nancy Holtz, Justice). Trial continues with sixteen (16) jurors present. Holtz, J. - J. Wall, ADA - P. Connolly, CR - B. White, ATTY		
09/21/2009	Defendant brought into court . Trial continues before Holtz, J. with sixteen (16) jurors present. Holtz, J. - J. Wall, ADA - P. Connolly, CR - B. White, ATTY		
09/22/2009	Defendant brought into court . Trial continues before Holtz, J. with sixteen (16) jurors present. Holtz, J. - J. Wall, ADA - P. Connolly, CR - B. White, ATTY		
09/23/2009	Defendant brought into court . Trial continues with sixteen (16) jurors present before Holtz, J. - J. Wall, ADA - P. Connolly, CR - B. White, ATTY		
09/24/2009	Defendant brought into court . Trial continues before Holtz, J. with sixteen (16) jurors present. The Commonwealth rests.		
09/24/2009	Deft files motion for a required finding at the conclusion of the Commonwealth's case in chief.	166	
09/24/2009	MOTION (P#166) denied (Nancy Holtz, Justice). - J. Wall, ADA - P. Connolly, CR - B. White, ATTY		
09/28/2009	Commonwealth files request for jury instructions	167	
09/29/2009	Defendant brought into court.		
09/29/2009	Deft files motion in limine #1 Kareem Fountain	168	
09/29/2009	Deft files motion in limine # 2 Kareem Fountain . Trial continues before Holtz, J. with sixteen (16) jurors present. Spanish Interpreter Maria Faras present and sworn. Holtz, J. - J. Wall, ADA - P. Connolly, CR - B. White, ATTY	169	
09/30/2009	Defendant brought into court . Trial continues before Holtz, J. with sixteen, (16) jurors present. Defendant rests. Defendant's oral motion for a required of not guilty made and denied. At the time of final submission of the case to the jury thr Court selects John J. Culhane in seat # 10 as foreperson of the Jury. Jurors in seat # 3 Gail Olivier, Juror in seat # 8 Dwayne Burgess and juror in seat # 13 Mary Bleach and juror in seat # 14 Jonelyn Longenstein were drawn as alternate jurors to be kept separte and apart from the rest of the jurors. Deliberations commence. Jurors allowed to separte and reconvene at 9:00 am on 10/1/09. Holtz, J. - J. Wall, ADA - P. Connolly. CR - B. White, ATTY		
10/01/2009	Defendant brought into court . Deliberations continue.		
10/01/2009	Deft files motion for required finding of not guilty at the close of all evidence.	170	
10/01/2009	MOTION (P#170) denied as an oral motion was already made and denied. That ruling will apply to this written motion as well nunc pro tunc to 9/30/09.		
10/01/2009	Deft files ex-parte motion for funds foe witness travel expenses	171	
10/01/2009	MOTION (P#171) allowed . Jurors allowed to separte and reconvene on 10/2/09 at 9:00 am. Holtz, J. - J. Wall, ADA - P. Connolly, CR - B. White, ATTY		
10/02/2009	Defendant brought into court . Deliberations continue. Jurors allowed to separte and reconvene at 9:00am on 10/5/09. Holtz, J. - J. Wall, ADA - P. Connolly, CR - B. White, ATTY		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
10/05/2009	Defendant brought into court . Deliberations continue.		
10/05/2009	RE Offense 1:Guilty verdict (lesser offense) Murder in the Second Degree		
10/05/2009	RE Offense 2:Guilty verdict		
10/05/2009	RE Offense 3:Not guilty verdict		
10/05/2009	RE Offense 4:Guilty verdict		
10/05/2009	Verdict affirmed, verdict slip filed	172	
10/05/2009	Verdict affirmed, verdict slip filed	173	
10/05/2009	Verdict affirmed, verdict slip filed	174	
10/05/2009	Verdict affirmed, verdict slip filed . Continued to 10/6/09 at 10:00 am for sentencing. Jail list. Holtz, J. - J. Wall, ADA - P. Connolly, CR - B. White, ATTY	175	
10/06/2009	Defendant brought into court . The Commonwealth moves for sentencing.		
10/06/2009	Deft files sentencing memorandum	176	
10/06/2009	Sentence imposed as to offense # 001 - M.C. I cedar Junction for and during the term of his natural life. Mittimus issued.		
10/06/2009	Sentence imposed as to offense # 002 - M.C.I. Cedar Junction - Max. Ten (10) years - Min. Eight (8) years from and after offense # 001. Mittimus issued		
10/06/2009	Sentence credit given as per 279:33A: 2,656 days.		
10/06/2009	Sentence imposed as to offense # 004 - M.C.I. Cedar Junction Max. Five (5) years - Min. Four and One Half (4&1/2) years from and after sentence imposed on offense # 002. Mittimus issued		
10/06/2009	Victim-witness fee assessed: \$90.00		
10/06/2009	Notified of right of appeal under Rule 65		
10/06/2009	Defendant warned per Chapter 22E Sec. 3 of DNA		
10/06/2009	Abstract sent to RMV , Defendant discharged as to offense #003. Juror questionnaires ordered impounded per order of the Court, Holtz, J. -J. Wall, ADA - P. Connolly, CR - B. White, ATTY		
10/09/2009	Notice of appeal from sentence to Massachusetts Correctional Institution, Cedar Junction, filed	177	
10/21/2009	Victim-witness fee paid as assessed. 90.00		
10/21/2009	NOTICE of APPEAL FILED by Joseph Cousin	178	
11/04/2009	Defendant files MOTION to revise and revoke sentence No action to be taken at request of the defendant (Holtz, J and ADA J. Wall notified 11/4/09)	179	
11/06/2009	Attorney, William M White Jr's MOTION to withdraw as counsel of record and to have CPCS appointed for purposes of appeal for Joseph Cousin (Holtz, J notified 11/6/09)	180	
11/09/2009	Court Reporter Cercone, Diane is hereby notified to prepare one copy of the transcript of the evidence of 03/11/2005. Motion to Dismiss before Hinkle, J	181	
11/09/2009	Court Reporter Connelly, Mary Paula is hereby notified to prepare one copy of the transcript of the evidence of September 11, 14,15,16,17,18,21,22,23,24,29,30, and October 1,2,5,6, 2009. Motions, Impanelment, Trial Verdict and Sentencing before Holtz, J	182	
11/10/2009	Transcript of testimony received from court reporter, Cercone, Diane		
11/17/2009	Notice of assignment of counsel received from CPCS appointing Atty. Robert Shaw for direct appeal		
11/27/2009	Appearance of Deft's Atty: Robert F Shaw		
04/29/2010	Commonwealth files Motion to Duplicate A DVD Presented at Sentencing.	183	
04/29/2010	MOTION (P#183) allowed. Ball, J (ADA to make a copy and return original to Clerk's Office)		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
05/19/2010	Order from Appellate Division of the Superior Court Department for the Review of Sentence it is ORDERED that the judgments imposing said sentences stand and that said appeal be and is hereby dismissed. (Dortch-Okara, Gershengorn & Lauriat, JJ).	184	
06/18/2010	Transcript of testimony received volumes # 1 thru 16 from court reporter, Connelly, Mary Paula		
08/03/2010	Notice sent to attorneys that transcripts are available. J. Zanini and R. Shaw		
10/21/2010	Court Reporter McCann, Nancy is hereby notified to prepare one copy of the transcript of the evidence of 01/05/2004. Motion to Suppress		
10/22/2010	Deft files Motion for Transcripts(Two Dates) Essential to the Appellate Process. (Notice to Holtz, J. w/copy and docket sheets on 10/25/2010)	185	
12/01/2010	MOTION (P#185) allowed dated 11/15/2010. Holtz, J.		
12/07/2010	Court Reporter Cercone, Diane is hereby notified to prepare one copy of the transcript of the evidence of 11/10/2004		
12/07/2010	Court Reporter Cercone, Diane is hereby notified to prepare one copy of the transcript of the evidence of 11/15/2004		
04/15/2011	Transcript of testimony received from Transcript of proceedings from Court Reporter McCann, Nancy		
05/13/2011	Transcript of testimony received from Transcript of proceedings from Court Reporter Cercone, Diane Hearing: re Motions 11/10/2004 and 11/15/2004.		
04/04/2012	Appearance of Commonwealth's Atty: Vincent DeMore received.		
11/14/2012	Notice of completion of assembly of record sent to clerk of Appeals Court and attorneys for the Commonwealth and defendant.		
11/14/2012	Two (2) certified copies of docket entries, original and copy of transcript, two (2) copies of exhibit list and copy of the notice of appeal(Paper #178), each transmitted to clerk of appellate court.		
11/21/2012	Notice of docket entry received from the Appeals Court. Case was entered in this Court on 11/16/12	186	
01/03/2013	Notice of docket entry received from the Appeals Court. Please take note that, with respect to the MOTION to stay and for leave to file motion for new trial within 60 days, filed by Joseph Cousin. (Paper #4), on December 26, 2012, the following order was entered on the docket: RE#4: The appellant is given leave to file, and the trial court to consider, a motion for new trial. Appellate proceedings are stayed to 2/27/2013, and a status report shall be filed then concerning the filing of the motion, to be submitted in the trial court by 2/25/2013, according to counsel.	187	
03/01/2013	Defendant's Motion for new trial with memorandum in support of motion for new trial along with Affidavit's of Robert F. Shaw Jr., Kenneth Moses, Cindi Cousin-Smith, Marvin Smith, Maria Souto, Demetrius Williams and Joseph Cousin. Also included Exhibits 1 through 39	188	
03/01/2013	Defendant files Motion for Evidentiary Hearing. (Parties notified)	189	
04/23/2013	Commonwealth is ordered to file response or opposition to Defendant's Motion for a New Trial. within 120 days Locke, RAJ.(Parties notified 4/24/2013)	190	
07/01/2013	Appearance of Commonwealth's Atty: Amanda Teo: files notice of appearance		
07/02/2013	Notice of Docket Entry Received from the Appeals Court. Re#7: Appellate Proceedings Stayed to 8/29/13. Status Report Due then as to the Filing of the Commonwealth's Opposition and other Progress Toward Disposition of the Motion.	191	
08/19/2013	Commonwealth files Assented-To Motion for Additional Time to Respond to the Defendant's Motion for a New Trial (Locke, RAJ- w/copy)	192	
08/21/2013	MOTION (P#192) allowed. Locke, RAJ (A. Teo, ADA and R. Shaw, Atty notified w/copy; copies attached to motion)		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
09/27/2013	Commonwealth files: Motion for additional time to respond to the defendant's motion for a new trial. (Notice sent to Locke, RAJ. w/copy & doc. sheets - 9/30/13)	193	
10/02/2013	RE: MOTION (P#193) allowed but no further extensions shall be granted as endorsed. (Locke, RAJ.). 10/1/2013. Copy mailed to Attorney Amanda Teo.		
10/21/2013	Commonwealth files: Opposition to the defendant's motion for new trial. (Notices sent to Locke, RAJ. w/copy of (P#194) docket sheets & R. Shaw, Attorney - 10/22/13)	194	
11/04/2013	Defendant files: Limited Reply to Commonwealth's Opposition to Defendant's Motion for New Trial. (Locke, RAJ. notified with copy).	195	
10/22/2014	Notice of docket entry received from Appeals Court Clerk's Office: RE:#24: Appellate proceedings STAYED to 11/21/2014. Status report due then as to pending motion for a new trial. *Notice/Attest.	196	
12/12/2014	Defendant brought into court.		
12/12/2014	Hearing Re: Status. After hearing, case is continued to 2/6/15 at 2pm for post sentence hearing. Sanders, J--A.Teo--ADA--R.Shaw--Atty--JAVS--ERD		
03/13/2015	Defendant brought into court . Non Evidentiary Hearing re; motion for new trial. After hearing taken under advisement. Sanders, J. - J. Zaninni, A. Teo, ADAs - M. Pollier, CR - R. Shaw, ATTY		
05/06/2015	Notice of Docket Entry received from the Appeals Court stating, RE:#29: Appellate proceedings STAYED to 06/01/2015. Status report due then concerning trial court's disposition pending motion for new trial. *Notice/Attest/Sanders, J.	197	
05/21/2015	MEMORANDUM & ORDER: Accordingly it is hereby ordered that an evidentiary hearing limited to the issues described in this memorandum be held on 7/1/15 . , (Janet L. Sanders, Justice)	198	
06/08/2015	Commonwealth files Motion to Reschedule the Evidentiary Hearing on the Defendant's Motion fo New Trial. (Copy with notice and docket to Sanders, J, - copy with notice to P. Shaw, Attorney)	199	
06/10/2015	Deft files opposition to postponement of evidentiart hearing	200	
06/12/2015	MOTION (P#199) denied (Janet L. Sanders, Justice). Copies mailed		
06/22/2015	Public record report filed by City of Boston	201	
06/22/2015	Commonwealth files renewed motion for evidentiary hearing	200.1	
06/22/2015	Commonwealth files renewed motion to reschedule the evidentiary hearing on the Defendants motion for a new trial (Copy w/notice and docket to Sanders, J and copy w/notice to R. Shaw, Attoreny)	204	
06/24/2015	Deft files notice of agreement to posstpone evidentiary hearing and defense request for a timely motion , if any by the Commonwealth for the production of documents	202	
06/24/2015	Continued until 9/11/2015 before Sanders J. for evidentiary hearing re; motion for new trial . Sanders, J. (both parties notified) (courtroom to be determined)		
06/26/2015	Deft files notice of agreement to postpone evidentiary hearing and defense request for a timely motion , if any, by the Commonwealth for the production of documents. (Copy w/notice and docket to Sanders, J and copy w/notice to A. Teo, ADA and J. Zanini, ADA)	203	
09/11/2015	Defendant brought into court .		
09/11/2015	Appearance of Commonwealth's Atty: David S Bradley		
09/11/2015	Deft files motion to cross examine adverse witness	205	
09/11/2015	Deft files motion to prohibit unnecessary waiver of attorney client privelege	206	
09/11/2015	MOTION (P#205) allowed.		
09/11/2015	MOTION (P#206) reserved. Hearing held re motion for a new trial.. Continued to 9/17/15 at 9:00am for further hearing. Habe faxed to Souza. Sanders, J. - D. Bradley, A. Teo, ADAs - F. Leroux, CR - R. Shaw, ATTY		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
09/14/2015	Deft files motion for order of sequestration directing witness not to discuss testimony during recess	207	
09/14/2015	MOTION (P#207) denied as endorsed, Sanders, J. (parties notified by phone)		
09/17/2015	Defendant brought into court. Hearing re motion for new trial resumes before Sanders,J		
09/17/2015	Continued to 10/21/2015 for hearing on motion for new trial in Ctrm 1017 .Habe to Souza(1st van) (Janet Sanders, Justice)D.Bradley,ADA; A.Teo,ADA; R.Shaw,Atty; N.King,court reporter		
09/17/2015	Deft's oral motion for funds for transcript of today's hearing allowed,Sanders,J		
09/26/2015	CKA alias created for party #1 Party Name: Joseph Cousins Alias Name: Joseph Cousin		
10/21/2015	Event Result: The following event: Hearing scheduled for 10/21/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled. Hearing re: Deft's motion for a new trial resumes before Sanders, J.. After hearing, motion is taken under advisement. The Court Orders All Briefs to be filed by 11/30/15. Appearing : R. Shaw Atty, A. Teo and D. Bradley ADA's, D. Cercone CR.		
11/02/2015	Defendant 's Motion for funds to transcribe evidentiary hearing on October 21, 2015 and request that any transcription be provided to both parties simultaneously. (Copy with docket, notice to Sanders, J. , Copy with notice to A. Teo, ADA) -Sent	208	
11/12/2015	Endorsement on Motion for funds, (#208.0): ALLOWED		
11/18/2015	Notice of Entry of appeal received from the Appeals Court Re:#33 Appellate Proceedings Stayed to 12/14/15. Status Report due then Concerning Trial Court's Disposition of Pending Motion for New Trial. *Notice/Attest/Sanders, J	209	
11/19/2015	The following form was generated: Notice of P#209 to Sanders, J.		
11/30/2015	Defendant 's Motion of ... Joseph Cousin's Post- Evidence Proposed Findings of Fact, Conclusions of Law & Rulings. (Notice sent to Sanders, J and A. Teo, ADA)	210	
11/30/2015	Commonwealth 's Motion regarding Post-Evidentiary Hearing Memorandum. (Notice to Sanders, J and R. Shaw, Atty)	211	
12/02/2015	The following form was generated:		
12/02/2015	The following form was generated: Clerk's Notice Sent On: 12/02/2015 11:18:23		
12/02/2015	The following form was generated:		
12/02/2015	The following form was generated: Clerk's Notice Sent On: 12/02/2015 16:16:43		
12/03/2015	The following form was generated:		
12/03/2015	The following form was generated: Clerk's Notice Sent On: 12/03/2015 09:11:34		
02/11/2016	Endorsement on Motion for new trial , (#188.0): ALLOWED (see memorandum of decision) Sanders, J.		
02/11/2016	MEMORANDUM & ORDER: of decision "Allowing" defendant's motion for new trial, Sanders, J. (parties notified with copies)	212	
02/11/2016	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: Robert F. Shaw, Esq. Attorney: David Stuart Bradley, Esq. Attorney: Amanda Teo, Esq. Witness: Thell Valentine (DOB: 11/22/84) Holding Institution: Souza Baranowski Correctional Center		
02/12/2016	Habeas Corpus for defendant issued to Souza Baranowski Correctional Center returnable for 02/18/2016 11:00 AM Bail Hearing.		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
02/12/2016	Notice of appeal filed Applies To: Teo, Esq., Amanda (Attorney) on behalf of Commonwealth (Prosecutor)	213	
02/16/2016	The defendant is committed without bail for the following reason: Per Order of the Court.		
02/18/2016	Brought into Court. Sanders, J. - A.Teo, D.Fredette & D. Bradley, ADA's - R. Shaw, Atty - R. LeRoux, C./R. The following event: Bail Hearing scheduled for 02/18/2016 11:00 AM has been resulted as follows: Result: Bail hearing not Held / Commonwealth's motion held.		
02/18/2016	Commonwealth's Motion to reopen the evidence and for reconsideration of this courts order granting defendant's motion for new trial, after hearing, Court corrects its decision (as set forth in open court) striking the phrases re: Atty's payment of Mclaughin's legal bills as they appear on P.#13 & 23 of the decision. Sanders, J.	214	
02/18/2016	Defendant's Notice of suggested non-substantive correction	215	
03/14/2016	General correspondence regarding AMENDED memorandum of decision and order "allowing" defendant's motion for new trial, filed. Sanders, J. (parties notified)	216	
03/14/2016	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: Robert F. Shaw, Esq. Attorney: David Stuart Bradley, Esq. Attorney: Amanda Teo, Esq.		
07/18/2016	Notice sent to attorneys that transcripts are available. Cd Transcripts of 2/18/16, 9/11/15, 9/17/15, 10/21/15 copied and sent to J. Zanini, A.D.A., and R. Shaw, Atty. Sent 7/18/16.		
08/09/2016	Appeal: notice of assembly of record sent to the Appeals Court Applies To: Stanton, Clerk, Hon. Joseph (Other interested party); Shaw, Esq., Robert F. (Attorney) on behalf of Cousins, Joseph (Defendant); Zanini, Esq., John P (Attorney) on behalf of Commonwealth (Prosecutor); Teo, Esq., Amanda (Attorney) on behalf of Commonwealth (Prosecutor)		
08/09/2016	Appeal: Statement of the Case on Appeal		
08/12/2016	Notice of Entry of appeal received from the Appeals Court	217	
09/13/2016	Event Result: The following event: Conference to Review Status scheduled for 09/13/2016 02:00 PM has been resulted as follows: Result: Defendant not in Court, Presence excused, Status Re: Appeal held before Roach RAJ. Continued by agreement to 6/22/17 at 2PM for status re: Appeal (Ctrm 906, Deft excused) - Roach RAJ - A.Teo, ADA and R.Shaw, Atty each via electronic mail		

Case Disposition

Disposition	Date	Case Judge
Disposed by Jury Verdict	10/05/2009	

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
NO. 02-10867

COMMONWEALTH

vs.

JOSEPH COUSIN

MEMORANDUM OF DECISION AND ORDER
REGARDING NEED FOR EVIDENTIARY HEARING
ON DEFENDANT'S MOTION FOR NEW TRIAL

After his first trial ended in a hung jury, the defendant was convicted on October 5, 2009 of second degree murder in the 2002 shooting death of Trina Persad. He now contends that he is entitled to a new trial based in part on his contention that his trial counsel's representation of Boston police officers before and during his representation of the defendant created an actual conflict of interest. Because the existence of such a conflict does not require the defendant to prove that he was prejudiced in some way, and because the fact of such representation is undisputed, the defendant argues that his motion should be allowed without an evidentiary hearing. The Commonwealth on the other hand maintains that this Court should deny the motion without an evidentiary hearing because the defendant has not raised a "substantial issue." See Commonwealth v. Shuman, 445 Mass. 268, 278 (2005). This Court disagrees with both parties and concludes that a hearing is required so that a fuller record may be developed regarding trial counsel's representation of police officers and his financial ties to the Boston Police Department – an issue which this Court concludes is a substantial one meriting further exploration.

The basis for defendant's claim stems from his trial counsel William White's connection to two highly publicized lawsuits that involved claims of police misconduct in criminal cases. The first was brought by Stephen Cowans against Boston Police officer Dennis LeBlanc and Rosemary McLaughlin. White's firm Davis Robinson & White, LLP represented McLaughlin from April 2006 until that lawsuit was settled in September 2007. The second was brought by Shawn Drumgold against (among others) Boston police officer Paul Murphy and homicide detective Timothy Callahan. White entered an appearance on behalf of Murphy on April 8, 2006, just two days after his then law-partner Robinson entered an appearance for McLaughlin. White, who launched his own practice in May 2007, continued to represent Murphy until January 2008 (when Murphy was dismissed from the case) and then that same month, entered an appearance on behalf of Callahan, whom he represented until the case concluded in 2011. Both the Drumgold and the Cowans lawsuits involved allegations that police intentionally withheld evidence and otherwise engaged in misconduct in investigating the criminal cases against the two plaintiffs, both of whose convictions were subsequently overturned.

The defendant's second trial also involved allegations of police misconduct. Those allegations extended to the Boston Police Department's Latent Print Unit and work performed under the supervision of McLaughlin, a defendant in the Cowans matter. The Commonwealth maintains that because the Cowans case had already concluded by the time White took over the defendant's case, there can be no actual conflict, particularly since McLaughlin was not White's client but was represented by White's then-law partner Robinson. As to White's representation of Murphy and Callahan, those officers had no involvement in the case before this Court. However, Callahan worked in the same homicide division as Detective Daniel Keeler, the lead homicide investigator in the instant case. One of the issues in both of the defendant's trials

concerned the manner in which Keefer interrogated a key witness and otherwise investigated the case.

White has submitted an affidavit stating that he did not receive any confidential information from McLaughlin, and talked to her only once. As to the part he played in the Drumgold litigation, White states that this did not affect his representation of the defendant. The record also shows, however, that White and/or his former law firm were paid over \$300,000 by the City of Boston for their representation of police officers in the Drumgold and Cowans matters between February 2007 and June 2010. Davis Robinson & White, LLP was a very small law firm when White was a partner, and the record before the Court is unclear as to whether White benefited from Robinson's representation of McLaughlin. When White left the firm to open his own law office, he remained in the same complex of offices for some period of time and arguably maintained some kind of relationship with his old firm, if only with respect to referring clients. And although White states that he had "already been paid" for his work in the Drumgold litigation before the defendant's trial in this Court, the Drumgold civil case in federal court was at its height precisely around the time of White's representation of the defendant in the instant case.¹ Indeed, White acknowledges that his involvement in Drumgold, which put the Boston Police Department under intense public scrutiny, could very well have been of concern to his criminal clients, including the defendant.²

¹ There were two trials in the Drumgold matter. The first was held in April 2008 and the second in September 2009. White was appointed to represent the defendant in the instant case in October 2008; the defendant's second trial took place in October 2009.

² As a consequence, White says that "I believe that I told Mr. Cousin" about his representation of Callahan and Murphy. Even if he had, the evidence now before the Court does not support the conclusion that there was a valid waiver of any conflict. See e.g. Commonwealth v. Martinez, 425 Mass. 382, 392 (1997). (Because such a waiver must be clear and unambiguous, the court

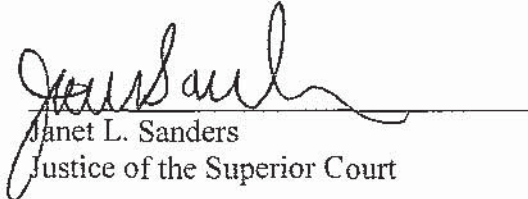
As to White's assertion (and the Commonwealth's argument) that his representation of the defendant was not affected, that is essentially beside the point, at least at this juncture. Both the Sixth Amendment to the United States Constitution and article 12 of the Declaration of Rights entitle a defendant to the "untrammelled and unimpaired assistance of counsel free of any conflict of interest and unrestrained by commitments to others." Commonwealth v. Michel, 381 Mass. 447, 453 (1980), quoting Commonwealth v. Davis, 376 Mass. 777, 780-781 (1978). It is for that reason that the SJC has held that, at least for article 12 purposes, the defendant need not demonstrate prejudice once a genuine conflict has been shown. As explained by the SJC, it chose that "more protective course to avoid putting the defendant in the untenable position where he would otherwise be 'put to the burden, perhaps insuperable, of probing the resolve and possible mental conflict of counsel. Both the potential for an [adverse effect on counsel's performance] and the difficulty of proving it are apparent, particularly as to things that may have been left not said or not done by counsel.'" Commonwealth v. Martinez, 425 Mass. 382, 388 (1997), quoting Commonwealth v. Hodge, 386 Mass. 165, 169-170 (1982).

As to whether the defendant has shown that there is at least a substantial issue that such an actual conflict of interest arose from White's dual representation, this Court concludes that the defendant has met that initial burden. "An 'actual' or 'genuine' conflict of interest arises where the 'independent professional judgment' of ...counsel is impaired, either by his own interests, or by the interests of another client." Commonwealth v. Stote, 455 Mass. 213, 218 (2010) quoting Commonwealth v. Shraiar, 397 Mass. 16, 20 (1986). This Court agrees with the Commonwealth that the standard for demonstrating such a conflict is relative high: actual

has an "affirmative duty" to ensure that the waiver was voluntary and intelligent by engaging in a colloquy with the defendant on the record).

prejudice need not be proven because it is “inherent in the situation,” meaning that “no impartial observer could reasonably conclude that the attorney is able to serve the defendant with undivided loyalty.”” Commonwealth v. State, *supra*, quoting Commonwealth v. Mosher, 455 Mass. 811, 819-820 (2010). Whether that standard has been satisfied, however, depends on the unique circumstances of each case. This Court cannot make that determination without a more complete understanding both as to the extent to which White (and his former law firm) represented Boston police before, during and after the defendant’s two trials, and the degree to which White had a financial interest in maintaining a relationship with the Boston Police Department at the time he was representing the defendant.

Accordingly, it is hereby **ORDERED** that an evidentiary hearing limited to the issues described in this Memorandum be held on 7/1/15.


Janet L. Sanders
Justice of the Superior Court

Dated: May 20, 2015

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
NO. 02-10867

COMMONWEALTH

vs.

JOSEPH COUSIN

MEMORANDUM OF DECISION AND ORDER
ON DEFENDANT'S MOTION FOR NEW TRIAL

(as amended)

After his first trial ended in a hung jury, the defendant was convicted on October 5, 2009 of second degree murder in the 2002 shooting death of Trina Persad. He now contends that he is entitled to a new trial on the grounds that his lawyer's representation of Boston police officers before and during his representation of the defendant created an actual conflict of interest. As a consequence of his counsel's divided loyalties, the defendant argues that he was denied effective assistance of counsel in violation of the Sixth Amendment to the United States Constitution and article 12 of the Massachusetts Declaration of Rights. On September 11, September 17, and October 21, 2015, this Court conducted an evidentiary hearing limited to this issue. After careful consideration of the evidence presented at that hearing together with the submissions of both parties, this Court concludes that the defendant's Motion for New Trial must be Allowed.

FACTUAL BACKGROUND

The basis for the defendant's motion stems from his trial counsel William White's connection to two highly publicized federal civil rights lawsuits that involved allegations of police misconduct committed in the course of criminal investigations. The first case was brought by Stephen Cowans against Dennis LeBlanc and Rosemary McLaughlin, both with the

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Boston Police Department's Latent Print Unit. White's firm, Davis, Robinson & White, LLP (DRW), represented McLaughlin who, as LeBlanc's supervisor and verifying examiner, was also involved in the criminal investigation of the matter that led to criminal charges against the defendant Cousin. The second lawsuit was brought by Shawn Drumgold against (among others) Boston homicide detectives Paul Murphy and Timothy Callahan. White was Murphy's, then Callahan's lawyer between 2006 through at least 2011. White was appointed to represent Cousin, the defendant in the instant case, in October 2008 and handled his second trial, which involved issues of police misconduct similar to those asserted in the Drumgold and Cowans matters.

The timing of these events is not disputed and was enough (in this Court's view) to raise a substantial issue. See Memorandum of Decision and Order Regarding the Need for an Evidentiary Hearing, dated May 20, 2015. What was not clear was the nature and extent of White's involvement in the federal cases (particularly the degree to which he economically benefitted from them), his relationship to DRW, and what, if anything, he told the defendant about the federal cases when he undertook to represent him. To get answers to these questions, this Court held an evidentiary hearing, which included testimony from both White and the defendant, as well as 32 exhibits together with other exhibits attached to the parties' pleadings. Where the evidence was in conflict, this Court has made findings of fact based on that testimony it determines to be credible together with the reasonable inferences drawn therefrom. I have also taken judicial notice of certain pleadings.

A. Cowans, Drumgold and the Case Against Cousin

The federal cases brought by both Cowans and Drumgold alleged wrongdoing by the Boston Police Department in the investigation and prosecution of state criminal charges that led to their convictions and incarceration. Before the federal lawsuits were filed, these allegations

resulted in the court vacating their convictions and the Suffolk County District Attorney's Office dropping all charges against them. These events took place right around the time that the defendant Cousin was being brought to trial for the first time in the instant case. That first trial involved similar allegations of misconduct by members of the Boston Police Department. It also occurred when there was increased public scrutiny of the Department, more particularly its homicide division. Although White was not involved in that first trial, he was nevertheless aware of what happened at it (having necessarily reviewed a transcript of those proceedings in preparation for the second trial) and of the extensive attention that both the Drumgold and the Cowans cases received in the media around that same time. The context in which White undertook Cousin's representation and the details of the two federal cases in which White or DRW were involved are important to this Court's analysis.

1. The State Case against Cowans

In July 1997, a Suffolk County grand jury indicted Stephan Cowans of various crimes arising from a shooting in Roxbury. A key issue in the case was the identification of Cowans as the perpetrator. Cowans was subsequently convicted on all charges, and (with one exception) his conviction on the charges was upheld on appeal. Commonwealth v. Cowans, 52 Mass.App.Ct. 811 (2001). That was not the end of the case, however: in May 2003 pursuant to a stipulated court order, certain items of physical evidence, including a baseball cap worn by the perpetrator and swabbing from the rim of a glass mug the perpetrator used, underwent DNA testing. The results showed the presence of the same DNA profile on all items, and that profile did not match that of Cowans.

Subsequent investigation by the Suffolk County District Attorney's Office turned up an even more serious flaw in the criminal investigation: a latent fingerprint recovered on a critical

item of that physical evidence had been identified at Cowans' trial as matching his prints, when in fact it did not. The individual who had conducted that fingerprint examination was Dennis LeBlanc, working under the supervision of Rosemary McLaughlin; both were with the Boston Police Department's Latent Print Unit. On January 23, 2004, the Commonwealth joined in the defendant's Motion for a New Trial and Cowans' conviction was vacated. On February 2, 2004, the Commonwealth filed a Nolle Prosequi based on its conclusion that Cowans was innocent.

2. The State Case against Drumgold

On the evening of August 19, 1988, 12-year-old Darlene Tiffany Moore was shot and killed when two or three men wearing Halloween masks opened fire on a crowd. Shawn Drumgold and another individual, Terrence Taylor, were subsequently charged with murder. Before the trials, both defendants successfully moved to suppress statements that they made to Boston police homicide detectives: in Drumgold's case, a Superior Court judge (Volterra, J.) concluded that there was "egregious prosecutorial misconduct" that required suppression of Drumgold's statements because he was questioned at the police station in direct violation of a judge's order. At trial, one of the key issues was the identification of Drumgold as one of the perpetrators. At the close of the Commonwealth's case, a required finding of not guilty entered as to Drumgold's codefendant Taylor. Drumgold himself was convicted, however, and sentenced to life in prison. His conviction was affirmed on appeal. Commonwealth v. Drumgold, 423 Mass. 230 (1996).

During and after the direct appeal, Drumgold twice moved unsuccessfully for a new trial. By the time the third motion was filed in 2003, certain key witnesses had recanted the testimony they gave at the trial, claiming that they were the subjects of coercive police tactics. It was also revealed that a key prosecution witness had received favorable treatment from the police which

had not been disclosed to the defense. In seeking a new trial, Drumgold alleged among other things that the prosecution had withheld exculpatory material. On November 3, 2003, the Commonwealth joined in his request that his conviction be vacated, stating that its own investigation had caused it to conclude that Drumgold had not received a fair trial. Three days later, the Commonwealth filed a Nolle Prosequi.

3. The Federal Civil Rights Suits

With the state cases resolved in their favor, both Drumgold and Cowans proceed to file federal civil rights cases seeking damages against the Boston Police Department and certain of its members. Drumgold's case was filed first: on June 3, 2004, he sued Boston officers Richard Walsh and Paul Murphy (the lead detectives in the homicide investigation) as well Lieutenant Timothy Callahan and the City of Boston. The suit made the same allegations that had been the basis for Drumgold's motion for new trial. Specifically, it alleges that the individual defendants engaged in coercive tactics, pressured witnesses to give favorable testimony, and withheld exculpatory evidence, all pursuant to a custom and practice within the Boston Police Department that encouraged such conduct.

A year later, in July 2005, Cowans filed his own suit, naming as defendants LeBlanc and McLaughlin together with the City. The complaint cited the work of an internal police investigation of the Latent Prints Unit and a report by a team of fingerprint experts. Both sets of experts agreed that the testimony that LeBlanc gave at Cowans' trial regarding a match was "unquestionably false" and in direct conflict with the information available to him. This same information was available to McLaughlin when she verified the identification made by LeBlanc. To make matters worse, LeBlanc (according to complaint) later took steps to conceal his erroneous match even as the state criminal trial was being held. The individual defendants'

behavior was, according to the complaint, part of a systemic failure within the Boston Police Department, whose personnel “failed to follow basic established professional standards” and failed to employ “basic investigatory tools” at their disposal which should have eliminated Cowans as a suspect.

Cowans eventually settled his claim against the City of Boston in August 2006; the case against the remaining defendants was dismissed in September 2007. The Drumgold case proceeded through two trials and an appeal to the First Circuit, which upheld a \$14 million award against Callahan. Drumgold v. Callahan, 707 F.3d 28 (2013); see also See Drumgold v. Callahan, 806 F.Supp. 2d 405 (2011). The Drumgold and Cowans cases were the subject of intense publicity, both in 2003 as result of developments in the state court, and also several years later as the federal cases were litigated in the months leading up to Cousin’s second trial.

4. Commonwealth v. Cousin

As noted above, the case against Cousin was tried twice, the first time in November 16, 2004 and the second time in September 2009. White had no involvement in the first trial, which ended in a hung jury. Based on the parties’ own description of the events giving rise to the charges as well as the pleadings filed in the case, this Court has a clear picture of the respective positions that each party took at that first trial. This Court gleans the following from these materials.

On June 29, 2002, an individual in a Honda Civic fired a shotgun in the direction of a group of men on a basketball court at the Jermaine Goffigan Park in Roxbury. Ten-year-old Trina Persad, who was playing at the park, was struck by the bullets and later died of her injuries. About twenty minutes after the shooting, Boston police officer Scott Roby (who did not know of the incident) noticed a brown Honda Civic parked on a dead-end street off Columbia

Road known as a dumping ground for stolen vehicles. As he approached the Civic in his cruiser, he saw three men walk up to the Civic, one of whom was Cousin. Cousin opened the driver's side door. When Roby got closer, the men reversed direction but shortly thereafter, Cousin reappeared from an alley and was stopped by Roby. Noticing that the car's ignition was popped, Roby arrested Cousin for receipt of a stolen motor vehicle.

At the police station, Cousin was questioned by homicide detectives Daniel Keeler and Dennis Harris. By the time of the first trial in 2004, Keeler was already the subject of media scrutiny. As reported in the Boston Globe, he admitted to making false statements in a search warrant affidavit submitted in the course of one homicide investigation that led to murder charges against James Bush; Bush was acquitted. In several other criminal cases around that same time period, Keeler's interrogation techniques as well as his truthfulness were under attack by defense attorneys and were being questioned by judges. By April 2004, he was transferred out of the homicide unit. In October 2008 before Cousin's second trial, Keeler was given a thirty- day suspension for making false statements in connection with an internal police investigation of a report that he removed sunglasses from a store during a robbery investigation; he was reassigned to the Bureau of Administration & Technology. As of the date of Cousin's arrest, however, Keeler was still very much involved in the homicide division and acted as the lead investigator in the Persad killing.

Under questioning by Keeler, Cousin denied having anything to do with the shooting and claimed he was playing basketball with his friend "Worm" at the time. Only the last fifteen minutes of the interrogation was recorded. In the meantime, the Honda Civic was being checked for prints and other evidence. A spent shell casing was found inside the car. Two latent prints --- one from the an outside door handle and the other on the roof of the vehicle -- were

individuated to the defendant. Other prints were recovered that did not match that of the defendant. Among those prints were five from the driver's side of the vehicle that were individuated to one Cordell McAfee.

The forensic examiner who performed the work on the prints was Dennis LeBlanc, working under the supervision of Rosemary McLaughlin. Both LeBlanc and McLaughlin worked closely with Keeler during the investigation. According to LeBlanc's testimony at the first trial, he ran the prints through the Automated Fingerprint Identification System (or AFIS) maintained by the State Police to see if any matches could be made. Apart from the match to McAfee and the defendant, prints were also individuated to Christopher Amil, with no other matches made. As stated in June 29, 2002 and October 13, 2003 reports that summarized these results, LeBlanc's work was verified by Rosemary McLaughlin.

On July 2, 2002, Boston police charged the defendant and Marquis Nelson with murder; although Nelson's prints had not been found in the vehicle, certain witnesses interviewed by police had implicated him in the crime. On that same day, Cordell McAfee (whose prints were found inside the Honda Civic) was arrested on a probation violation. Keeler questioned McAfee, who had just turned fifteen. McAfee admitted to being inside the Honda Civic at the time of the shooting. The first hour or more of the interrogation was not recorded, nor was McAfee's mother present for a portion of it; neither Keeler nor Harris took notes or wrote a report as to what was said. Testifying at the first trial, Keeler admitted that, before the tape recorder was turned on, McAfee had been shown certain photo arrays that included Nelson's and Cousin's photographs and failed to identify them as the perpetrators. See Exhibit 37 submitted in support of defendant's Motion for New Trial. McAfee also told Keeler that two men named "Man" and "Daryl" were in the Civic with him. Later in the interrogation, McAfee

changed his story and implicated Nelson and the defendant.¹ Only this part of the interrogation was recorded, with no mention made about the failure to identify Cousin from the photo array or McAfee's information regarding Daryl and Man.

McAfee was the key prosecution witness at both the first and second trial of the defendant. He was not charged with murder but instead faced only a charge of receiving a stolen motor vehicle, for which he received probation. At the first trial, McAfee testified that he had made up the names of "Man" and "Daryl." Other evidence in the case, however, indicated that "Man" was the nickname of an individual named Donald Williams and that Williams was friendly with a man named Daryl Richardson. As it turned out, two of the prints found in the Civic were later matched to a Daryl Richardson, who had been arrested in 1998 (and thus presumably should have been in AFIS). This information did not come to light, however, until the shortly before the second trial, after LeBlanc and McLaughlin had been removed from the Latent Print Unit and their work in the Cousin case reviewed by another forensic examiner, Rachel Lemery.

In addition to McAfee, the Commonwealth had information from other individuals who linked Cousin to the Honda Civic and the shooting, but they changed their statements over time. For example, Richane Landrum initially told police he could not see who was inside the car, then changed his statement to identify the defendant, retracted that statement, then retracted the retraction. Another individual, Derrick Barnes, originally told police that he could not see who was inside the Civic, but ultimately testified at the second trial that he saw the defendant and Nelson inside the Honda when shots were fired from it. In return for his testimony, the District

¹ Some months after his questioning by police, McAfee implicated a third individual whom he identified only as "Steve." There is no evidence that police attempted to locate this person or even that he existed.

Attorney's Office promised not to prosecute Barnes for perjury and to assist him in resolving outstanding charges in other counties.

The manner in which McAfee was questioned and the reason why Landrum might have changed his story to implicate Cousin was the subject of a pretrial motion filed by Nelson's counsel before the first trial took place. That motion sought to dismiss the indictment or alternatively to preclude the identifications of both Nelson and Cousin by either McAfee or Landrum. In support of this motion, the defense alleged that the manner in which police obtained the identifications of Cousin and Nelson as the perpetrators was the result of impermissibly suggestive identifications and coercive interrogation tactics. The defense argued that the fact that McAfee's interview was only partially recorded was particularly suspect: when McAfee implicated the Man and Daryl, the interrogation was not recorded. It was only when he implicated Nelson and Cousin that the tape was turned on. The motion was denied, but the issues it raised remained live ones to be explored at trial.

At the first trial, the defense argued that the Commonwealth's witnesses were not credible and that police had mishandled the investigation in a rush to judgment. In preparation for that defense, codefendant Nelson's counsel sought discovery regarding Detective Keeler. In particular, the defense sought to obtain Keeler's personnel file as well as all reports, testimony and statements relating to Keeler's involvement in the Bush case and his admission that he made a false report in that matter. Although those discovery motions were denied, they do show that the defense regarded Keeler and the police investigation that he led to be vulnerable to attack and that Keeler's credibility would be an issue.

Any weaknesses in the police investigation were made all the more significant by the fact that Cousin called certain alibi witnesses in an attempt to establish that he was elsewhere in the

hours leading up to the shooting incident and was playing basketball when it happened, just as he had told police. These witnesses included his girlfriend Lakeisha Rivers, who testified that Cousin spent the previous night at her home and did not leave it until 4:00 p.m. on June 29, 2002 when he called a taxi. Business records from a transportation company confirmed that there had been a call for a pickup at that address at 4:16 p.m., and the driver of the taxi testified that he had picked up a young black male. This was important, since McAfee (at least at the first trial) claimed to have met up with Cousin that day sometime around noon. Two witnesses, including a DYS staff worker, placed Cousin at a DYS facility sometime after 5:00 p.m. Kareem “Worm” Fountain testified to being with Cousin that evening in Washington Park playing basketball until around 8:00 p.m. when the two parted ways. Another witness (who was not available to testify at the second trial) confirmed that she had seen Cousin at the Washington Park basketball game between 7:00 and 8:00. The shooting took place at 7:35 p.m.

On December 21, 2004, the jury returned verdicts of acquittal as to Cousin’s codefendant Marquis Nelson. Shortly before returning that verdict, the foreperson wrote a note to the judge stating that some jurors believed that both defendants had been “set up” by the Boston Police Department. See Commonwealth v. Cousin, 449 Mass. 809, 812 (2007). After the verdict as to Nelson, the jury reported that they were deadlocked as to Cousin. In the meantime, the prosecution had done a criminal records check as to the deliberating jurors and two alternates, revealing that five had significant criminal histories. A mistrial was declared as to Cousin, a decision that was upheld on appeal. Id.

Cousin’s counsel at the first trial, Willie Davis, was permitted to withdraw from the case in October 2008. William White, Davis’s former law partner, was appointed at Davis’ suggestion. White represented Cousin through his second trial, which commenced on September

11, 2009 before a different judge (Holtz, J.). Shortly before that trial was to begin, Rachel Lemery made the identification of Daryl Richardson's prints inside the Honda Civic -- an identification that LeBlanc (working under McLaughlin) had failed to make in the police investigation leading up to the first trial. Preparing for the second trial, White recalled that his former partner Robinson had represented McLaughlin and, with Robinson's help, arranged to talk to her by telephone. As White remembered it, the conversation was unproductive. Both LeBlanc and Lemery testified at the second trial regarding what prints were found in the Honda Civic. LeBlanc was not questioned about why he had not been able to individuate the prints to Richardson -- something that Lemery was able to do without difficulty when she reviewed the case in August 2009 shortly before the second trial.

The second trial concluded on October 5, 2009 with Cousin's conviction for second degree murder. He received a sentence of life in prison.

B. William White, DRW and Their Involvement in the Federal Cases

White was admitted to the Massachusetts bar in 1985. After stints with the Suffolk County District Attorney's Office and the Attorney General, he joined the law firm of Robinson & Davis as a partner in 1992. The firm formally organized as a limited liability partnership in 1996 under the name of Davis, Robinson & White. As of the time of Cousin's first trial, DRW's offices were located at One Faneuil Hall. The arrangement among the three partners -- White, Willie Davis, and Frances Robinson -- was that they shared common expenses, including rent, equipment costs, and the cost of a receptionist and associate. Each partner generated his or her own income, which was not shared. When any one of them entered an appearance in court, however, they did so under the firm's name. The office also had stationery that identified the firm as DRW and listed each of the three partners by name.

The focus of Davis' and White's work was on criminal law, with Robinson working in the area of insurance defense. Although the three lawyers worked independently, they would meet on a weekly basis to discuss the firm's cases. The firm would on occasion receive referrals to handle administrative disciplinary matters involving police officers. Robinson would receive these cases through referrals made by the Boston Patrolman's Union, and White recalled working on a couple of them. White would on occasion also work with Robinson on her insurance related matters.

On April 5, 2006, Robinson filed an appearance as the lead attorney for McLaughlin in the federal case filed by Cowans. She did so under the DRW name and listed its email as her contact for service of documents, court orders, and other notices. Robinson continued to represent McLaughlin until it was resolved on September 20, 2007. White was unable to locate the fee agreement that Robinson had with McLaughlin and could produce no documents or give any information as to how much income Robinson received for this representation. ~~Since it was the City of Boston that ultimately paid the damages to Cowans, however, this Court infers that it also paid McLaughlin's legal bills, just as it paid the legal expenses for the individual defendants in the Drumgold matter.~~

*See ruling
m #214
2/18/16
J. [signature]*

Just two days after Robinson entered her appearance in the Cowans case, White entered an appearance for homicide detective Paul Murphy, named as a defendant in the Drumgold civil rights suit. His notice of appearance identified the DRW firm by name, and the court docket listed White as a lead attorney. On January 7, 2008, the claims against Murphy, who was by then deceased, were dismissed for failure to substitute his estate as a named defendant. That same month, however, White entered an appearance as lead attorney for Lieutenant Timothy Callahan. By that time, White had started his own firm.

White formed his own firm, William White & Associates, in March 2007. He stayed at the same Faneuil Hall address as DRW, however, simply moving to another office next door. White continued to focus his practice on criminal work, much of it appointed. Referrals from his old firm of DRW were limited (as best White could recall it) to a couple of civil matters. White was Callahan's lawyer in the Drumgold case at least through 2011. He remained at the same Faneuil Hall address until January 2009, when he moved to another location.

When he was retained in the Drumgold federal case, White entered into a fee agreement with the City of Boston. Even though the City had separate counsel, the City's liability was contingent on the individual defendants' liability: that is, if the individual officers were absolved, then so too was the City. Their defense of the case was essentially a joint one. The City had also separately agreed to indemnify all of the individual defendants for their legal expenses. White worked closely with the City's lead counsel throughout the proceedings.

White was unable to locate a copy of his fee agreement with the City. He did recall, however, that he charged his time on an hourly basis, and that his monthly rate increased over time. According to City of Boston records, White was paid a total of \$152,404.29 for his work on the Drumgold case when he was with DRW. Once he formed his own firm, he received an additional \$158,537.50 for his work. According to these records, the majority of this fee was paid to White between July 1, 2007 and June 30, 2008.

The Drumgold case was indeed quite active during this period, with the docket containing no fewer than 200 entries during that time range. There were numerous court appearances regarding disputes over discovery, which was being actively conducted by all parties in the case. In October 2007, defense counsel (including White) filed summary judgment motions on behalf of their respective clients; those motions were heard in January 2008. Final pretrial conference

in the case was set for February 2008, resulting in the filing of a flurry of motions. The joint pretrial memorandum showed that the plaintiff was seeking to introduce evidence about other cases (including the Cowans matter) which had been investigated by the Boston Police Department's homicide division. In that connection, the plaintiff listed Detective Daniel Keeler as a potential witness. This was consistent with plaintiff's effort to show a pattern or practice of police misconduct, which was particularly important in plaintiff's case against the City.

By motion of the defendants, the court (Gertner, J.) ordered that the trial be divided into three phases, with the first phase to address the liability of defendants Walsh and Callahan (White's client). In the event that they were held liable, the matter would proceed to a trial regarding the liability of the City and then on to damages. The first phase trial took place in March 2008, with White actively participating. The jury found Callahan liable for one civil rights violation -- namely, that he had withheld certain exculpatory evidence regarding a key prosecution witness. They deadlocked on the issue of whether this had caused Drumgold's conviction.

Judge Gertner ordered a second trial, which was eventually scheduled for September 2009. White's work in the Drumgold case slowed down substantially in the months preceding that trial date. White nevertheless remained lead counsel of record for Callahan and fully intended to participate in the upcoming second trial. As it turned out, the second trial began around the same time as Cousin's second trial. By that time, White was Cousin's counsel, and as a result of the scheduling conflict, another lawyer, Hugh Curran, had to step in at the last minute to represent Callahan. White remained counsel of record, however, and in fact had made a court appearance on Callahan's behalf in August 2009, less than one month before Callahan's trial was to begin. Particularly given the history of the case, he had every expectation that his

services would likely be needed even after that second trial. White remained counsel of record for Callahan until it concluded. Indeed, the First Circuit decision upholding the jury verdict that was handed down in 2013 listed White as Callahan's lawyer on the appeal.

C. White's Appointment to the Cousin Case

White was appointed to represent Cousin in October 2008. His former law partner, Davis, had moved to withdraw, and recommended White to the court as successor counsel. Cousin, who was present in court for this event, informed the judge that he wanted to hire his own lawyer, provided his family was able to come up with the money. Judge Margaret Hinkle went ahead and appointed White, who entered an appearance in the case on October 22, 2008. At this point, White had his own practice.

Shortly after that appointment, White met with Cousin at the Nashua Street jail where Cousin was being held. Although White and Cousin gave different accounts as to precisely what was said, in important respects, they did not directly contradict each other. As Cousin recalls that meeting, White appeared anxious to gain his confidence, assuring him that he was "no corporate suit" and was a "really down" type of lawyer. White essentially agreed that he wanted to gain Cousin's trust. He also acknowledged that the appointment came at a time when he himself was anxious to acquire other clients, since his work on Drumgold earlier in the year had made it difficult for him to work on other cases. Although White would be working at court-appointed rates, the Cousin case had already received some publicity, making it particularly attractive to a lawyer like White who was trying to build his own practice.

As to what, if anything, was said about White's involvement in the Drumgold case, White acknowledged at the evidentiary hearing on this motion that "it was obvious that it was a conflict of interest" in his taking on Cousin's case at the same time as Drumgold and that he

therefore had some obligation to discuss it. Although he did not recall specifically what he said to Cousin about this, he testified that it would have been his “usual practice” to do so and that, as best he can recall, he did say something to Cousin at this initial meeting with him about White’s representing a police officer in a federal case. On his part, Cousin was emphatic in his claim to this Court that White said nothing to him at any time about representing a police officer, much less did he explain to him that it was the Drumgold case that White was involved in or the identity of his client. Indeed, Cousin testified that he first learned of White’s involvement from Drumgold himself, who wrote him a letter after Cousin was convicted in the second trial.

The Commonwealth argues that, given Cousin’s criminal record and his stake in the outcome, there is ample reason to question his credibility. Nevertheless, this Court is convinced that, whatever White did say, he did not give Cousin enough information about any conflict in order for Cousin to make a true choice as to whether he wanted to waive the conflict or instead request another lawyer. It also undisputed that Cousin was not asked to execute any written waiver.² Nor was the court (or anyone else) informed at any time before or during the second trial about the existence of a possible conflict. Indeed, the Commonwealth does not argue that, in the event this Court were to find a conflict of interest, it was validly waived. See Commonwealth v. Goldman, 395 Mass. 495, 506-507 (1985) (discussing conditions that must be fulfilled for there to be a valid waiver). The sole issue before this Court is therefore whether there was an actual or genuine conflict of interest by virtue of White’s dual representation.

² Consistent with Cousin’s testimony that White appeared anxious to gain his trust, White testified that he knew Cousin was “leery of lawyers at that point” and that White was concerned that requesting a written waiver would “infect the attorney-client relationship.”

DISCUSSION

The Court may grant a motion for new trial where “it appears that justice may not have been done.” Mass.R.Crim.P. (30)(b). Although generally addressed to the discretion of the Court, the motion must be granted if there is constitutional error that infected the trial.

Commonwealth v. Marrero, 459 Mass. 235, 240 (2011). Here, the defendant alleges that, a result of the divided loyalties of his trial counsel, he was deprived of effective assistance of counsel in violation of his rights under the Sixth Amendment of the United States Constitution and article 12 of the Massachusetts Declaration of Rights. Glasser v. United States, 315 U.S. 60, 75-76 (1942); Commonwealth v. Martinez, 425 Mass. 382, 387 (1997). The defendant bears the burden of proving such a violation. Commonwealth v. Walter, 396 Mass. 549, 554 (1986). This Court concludes that the defendant has met his burden and that a new trial must be granted.

The right to effective assistance of counsel includes within it an entitlement to the “untrammeled and unimpaired assistance of counsel free of any conflict of interest and unrestrained by commitments to others.” Commonwealth v. Michel, 381 Mass. 447, 453 (1980), quoting Commonwealth v. Davis, 376 Mass. 777, 780-781 (1978). Under federal constitutional law, a defendant is entitled to a new trial only if he demonstrates both that his attorney had an actual or genuine conflict of interest and that this conflict “adversely affected his lawyer’s performance.” Cuyler v. Sullivan, 446 U.S. 335, 350 (1980). In contrast, under article 12, a defendant who establishes an actual conflict of interest is entitled to a new trial without any further showing. That is, “he need not demonstrate that the conflict adversely affected his lawyer’s performance or results in actual prejudice.” Commonwealth v. Mosher 455 Mass. 811 (819 (2010)).

The reason why a defendant need not show actual prejudice is because the “effect of the conflict on the attorney’s representation of the defendant is likely to be pervasive and unpredictable, while the difficulty of proving it may be substantial, ‘particularly as to things that may have been left not said or not done by counsel.’” Commonwealth v. Mosher, 455 Mass. at 819, quoting Commonwealth v. Cobb, 379 Mass. 459 (1980). As the SJC has explained it, the defendant should “not to be put to the burden, perhaps insuperable, of probing the resolve and the possible mental conflict of counsel.” Commonwealth v. Cobb, *supra*. This difference between the United States Supreme Court’s interpretation of the Sixth Amendment and the SJC’s interpretation of article 12 is an important one. It means that this Court need not decide that White’s performance as Cousin’s trial counsel fell measurably below that expected from the ordinary fallible lawyer. Compare Commonwealth v. Kolenovic, 471 Mass. 664 (2015) (reversing lower court’s allowance of new trial because decision not to present a certain defense was a strategic one that was not manifestly unreasonable). If an actual or genuine conflict existed, then nothing further must be shown.

There are no bright line rules that this Court can resort to in determining whether there was an actual or genuine conflict in this case. Broadly stated, such a conflict exists “whenever there is tension between the interests of one client of an attorney and those of another.” Commonwealth v. Martinez, 425 Mass. at 388, quoting Commonwealth v. Michel, 381 Mass. 447, 451 (1980). Put another way, an actual conflict arises when “the ‘independent professional judgment’ of trial counsel is impaired, either by his own interests, or by the interests of another client.” Commonwealth v. Croker 432 Mass. 266, 272 (2000), quoting Commonwealth v. Shriaiar, 397 Mass. 16, 20 (1986). It would include circumstances where an “attorney’s regard for one duty, such as that owed to a third party or in service to his own

interests, lead the attorney to disregard another duty, such as that owed to his client.”

Commonwealth v. Perkins, 450 Mass. 834, 851 (2008). Demonstrating the existence of an actual conflict is not a minimal one, however. Prejudice must be “inherent in the situation,’ such that no impartial observer could reasonably conclude that the attorney is able to serve the defendant with undivided loyalty.” Commonwealth v Mosher, 455 Mass. at 819-820, quoting Commonwealth v. Epsom, 399 Mass. 254, 262 (1987).

The defendant argues that White was laboring under an actual conflict of interest by virtue of his representation of Callahan in the Drumgold matter. That representation began around the same time that White’s then law partner Frances Robinson undertook the representation of McLaughlin in the Cowans matter, which was settled only after the City was required to pay millions of dollars. All three cases (Cowans, Drumgold and Cousin) received media attention: thus, how White conducted his defense in the Cousin case would not be any secret to his client Callahan or to the City of Boston, who was paying White’s bills. More important, a zealous representation of Cousin necessarily included an attack on the homicide division of the Boston Police Department at the same time that White was defending one of its members against similar allegations.

The Commonwealth correctly points out that Callahan was not part of the investigation of Cousin. Moreover, although McLaughlin did have some limited involvement in the Cousin investigation, she was a client of Robinson, not White, and that representation had ended by the time White took over Cousin’s representation. It is generally true that there is no conflict of interest where the attorney’s relationship with one client has ended before the trial of the other client, or where the attorney represents two people on cases that are unrelated to each other. See e.g. Commonwealth v. Smith, 362 Mass. 782, 783 (1973); Commonwealth v. Fogarty, 419 Mass.

456, 459 (1995). It is equally true, however, that whether a conflict exists cannot be determined by the application of a rigid formula and requires a consideration of all the circumstances. One of those circumstances is that McLaughlin was a client of Robinson, White's partner when he was at DRW, and that Robinson continued to have enough of a relationship with McLaughlin such that, in preparation for the Cousin trial, White knew to go to Robinson in order to get in touch with McLaughlin. White had worked with Robinson in the past on insurance related matter and was a potential source of business once White set up his own firm. As to the Drumgold litigation, it bore remarkable similarities to the Cousin case, not just as to the underlying factual allegations but also as to the claims made regarding police investigative tactics. To vigorously defend Cousin, White would necessarily have to take a position that was not in the interest of his client Callahan in the Drumgold federal suit and, more broadly, that was damaging to the position of the Boston Police Department, counsel for which White worked closely as part of a joint defense.

This conflict was apparent when White took on the Cousin case. With the benefit of a transcript from the first trial together with other events unfolding at the time, White necessarily knew that the method in which Detective Keeler had questioned McAfee and other witnesses was subject to attack. He also knew that some witnesses had changed their stories over time. Whether it would be successful or not, there was at least an argument to be made that members of the Boston Police Department's homicide division had engaged in coercive and unfair techniques and ignored other investigatory leads in a rush to judgment.³ If anything, this potential defense became even stronger when it was discovered just weeks before the second trial

³ This Court takes no position on whether the police investigation of Cousin was or was not fair, since that is not necessary to the resolution of this motion. I need only be convinced (as I am) that a defense that took issue with how police handled the investigation was more than just an idle theory.

that LeBlanc (under the supervision of McLaughlin) had inexplicably failed to identify the print of Daryl Richardson inside the Civic -- a failure made significant by the fact that McAfee had initially implicated a "Daryl." There is no indication that police did anything to follow up on this information, despite the fact (as revealed at the second trial) that an individual by the name of Daryl Richardson had a criminal record that included a 1998 conviction. He thus would likely have had prints on file in AFIS in 2002.

To pursue this defense vigorously, however, White would not be acting in a way consistent with the interest of Callahan, a colleague of Keeler. Like Keeler in the Cousin case, Callahan in Drumgold was accused of engaging in conduct that created a danger of false testimony. Moreover, Drumgold's counsel was relying in part on a claim that this was part of a larger pattern or practice within the Boston Police Department. If White were to take the same position in the Cousin case, that could assist in Cousin's defense, but at the same time, could provide additional fodder for the plaintiff in Drumgold. This was made all the more problematic by the fact that the two trials were going on at the same time and that White continued to be Callahan's counsel of record both at the time of Callahan's second trial and thereafter. Where one client "might take umbrage" to a vigorous defense of the other client, there is a real danger that the lawyer "might be tempted to dampen the ardor of his defense of one in order to placate his other client." Zuck v. Alabama, 588 F.2d 436, 439-440 (5th Cir. 1979). That the lawyer may actually resist the temptation is beside the point, since the mere existence of the temptation is sufficient to preclude the dual representation. Id.

The Commonwealth points out that White's client in the Drumgold matter was Callahan, not the Boston Police Department; because of this distinction, it contends that any interest that White might have in protecting the department (as opposed to Callahan individually) was

“ephemeral” at best. This not only ignores the fact that Callahan’s interests were largely aligned with those of the City but more importantly, disregards the economic realities. As a result of its indemnification agreement with Callahan, the City paid all of White’s bills -- ~~as it did in the Cowans case when DRW, through Robinson, was counsel of record.~~ It would likely pay any judgment entered against Callahan or settlement reached in his case as well.

see ruling
m # 214
2/18/16
J. White

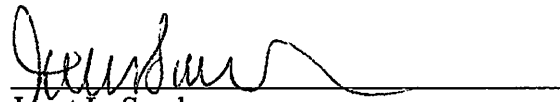
These economic realities also introduce a new element into the conflict analysis, which is White’s own interest. White became involved in the Drumgold litigation when he was at DRW. Although it is not entirely clear how he came to be chosen, DRW had in the past represented police officers involved in disciplinary matters. White’s partner Robinson had entered an appearance for McLaughlin in the Cowans case just two days before White entered his own appearance, suggesting that the firm had positioned itself to receive referrals for those kinds of cases. In March 2007, White broke off to form his own firm, but if anything, that made it all the more important for him to generate business sufficient to support that decision. White’s work in Drumgold was a very important part of business in the first year, accounting for fifty percent of White’s income. Although White himself did not participate in Callahan’s second trial, that was only because he was tied up in representing Cousin. He continued to be counsel of record and clearly anticipated that the City would continue to pay him as long as the Drumgold litigation continued, and even look to him for similar cases. As it turned out, the amount that the City paid White in 2009 going forward did not amount to much. But that is beside the point. The problem is that White had an economic or personal interest, at the time he represented Cousin, in remaining on good terms with the Boston Police Department, thus creating a substantial risk that the manner in which he represented Cousin could materially and adversely be affected. See Restatement Third of the Law Governing Lawyers. §125 (2000). As the entity that paid the

bills, the City was essentially White's largest paying client in the year leading up to Cousin's second trial. As noted above, it does not matter whether the temptation to maintain amicable relations with that client was resisted or not, since the risk that it could have an effect is enough.

Finally, the Commonwealth argues that, if this Court were to conclude there was an actual conflict of interest in this case, that would essentially call into question the validity of convictions obtained in a host of other cases in which White and his former partner Davis represented criminal defendants. This Court disagrees. The circumstances of this case are unique, such that this Court's holding is necessarily limited to those special circumstances. Moreover, this Court's conclusion does not rest on whether White was in fact effective in representing Cousin, just as it does not depend on any findings as to the fairness of the police investigation. In short, this Court does not regard this case as setting a precedent for any other new trial motions in cases where either White or Davis were involved. Ultimately, I can only decide the case before me.

CONCLUSION AND ORDER

For all the foregoing reasons, the defendant's Motion for New Trial is **ALLOWED** and it is hereby **ORDERED** that his conviction for second degree murder be set aside.


Janet L. Sanders
Justice of the Superior Court

Dated: February 10, 2016